

**S. 1448, THE SPOKANE TRIBE OF INDIANS OF  
THE SPOKANE RESERVATION EQUITABLE  
COMPENSATION ACT; S. 1219, THE PECHANGA  
BAND OF LUISENO MISSION INDIANS WATER  
RIGHTS SETTLEMENT ACT; AND S. 1447, A  
BILL TO MAKE TECHNICAL CORRECTIONS TO  
THE NATIVE AMERICAN WATER RIGHTS  
SETTLEMENTS OF THE STATE OF NEW MEXICO**

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**HEARING**

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE**

**ONE HUNDRED THIRTEENTH CONGRESS**

**FIRST SESSION**

\_\_\_\_\_  
**SEPTEMBER 10, 2013**

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**TUESDAY, SEPTEMBER 10, 2013**

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Maria Cantwell, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. MARIA CANTWELL,  
U.S. SENATOR FROM WASHINGTON**

The CHAIRWOMAN. The Senate Committee on Indian Affairs will come to order.

This afternoon, the Committee had scheduled a business meeting for consideration of the funding resolution for the period of October 1, 2013, through February 28, 2015. However, due to the absence of a quorum at this point in time, I am going to recess that part of today's executive session, subject to the call of the Chair, and then go into our formal legislative hearing that we are also scheduled for today.

We are honored to have the Honorable Kevin Washburn here, Assistant Secretary of Indian Affairs, from the U.S. Department of Interior. Also joining him are tribal members from three different tribes, the Chairman of the Spokane Tribe, Rudy Peone, and tribal elder Mrs. Marian Wynecoop. They are joined by the Chairman of the Pechanga Band of Luiseño Indians from California, Mr. Mark Macarro, and Mr. Matthew Stone, from the Rancho California Water District.

So this is our first hearing after the summer recess. I just wanted to mention that some of you may have noticed some changes in the Committee room. I wanted to make sure that the Committee room had an opportunity to currently reflect some of the constitu-

ents of our member colleagues. That is why we have selected some Edward Curtis photographs. Seattle native Tim Egan recently wrote a book about Curtis' journey among tribes for more than 30 years in the 1990s. His photographs documented almost 80 tribes west of the Mississippi River, from Mexico to the Alaskan north. So these photographs represent the various regions of members of this Committee.

Now to the business of the Committee today. This afternoon, the Committee is holding a legislative hearing on three different bills. The first is S. 1448, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act. The second is S. 219, the Pechanga Band of Mission Indians Water Rights Settlement Act. And the third is S. 1447, a bill to make technical corrections to the Native American Water Rights Settlements of the State of New Mexico.

At the core of the principles of tribal self-governance and self-determination is the ability of tribes to exercise jurisdiction over their lands and their resources. Often, legislation is necessary to ensure that tribes can exercise those rights and to bring resolution and certainty to decades-old disputes.

S. 1448, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act is a bill that I, along with Senator Murray, have introduced in previous sessions and introduced again in this Congress. We hope that this Committee will move this bill forward. The bill is vitally important to the Spokane Tribe. The bill would compensate the tribe for the past and continued use of tribal lands by the Federal Government. The lands were taken by the Federal Government to build the Grand Coulee Dam. The dam construction caused the flooding of over 3,000 acres of Spokane tribal lands, and those had significant economic, cultural and spiritual significance to the Spokane people.

For over 60 years, the tribe has sought resolution to this issue, and all other means of the settlement have been exhausted. So that is why this bill reflects the compromise between the Spokane Tribe and the Administration and those in Congress.

The bill that we will also hear about today, the second bill, is the Pechanga Water Settlement bill. That bill will ratify a settlement reached by the Pechanga Band and the United States and several California state water districts. This bill will bring certainty to all water users and end a dispute that began in 1951 over the Band's water rights. The bill was introduced by our colleagues, Senators Boxer and Feinstein, and I look forward to working with both of them in bringing this legislation to a vote in the Committee.

The final bill we will hear today is S. 1447, a technical correction bill that revises three prior New Mexico water rights settlements. These minor clarifications can only be made through Congress but are important to ensure that the prior water settlements are implemented as Congress intended. This bill was introduced by Senators Udall and Heinrich, and I look forward to working with them on the passage of that legislation as well.

So I am especially pleased to have all of these individuals with us here today. I am now going to turn to my colleague from New Mexico to see if he has an opening statement.

**STATEMENT OF HON. TOM UDALL,  
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Madam Chair. I very much appreciate the Chairwoman and the Ranking Member for quickly bringing S. 1447, the New Mexico Native American Water Settlements Technical Corrections Act, before this Committee for review. This bill makes technical corrections to three tribal water settlements that were approved by Congress in the 111th Congress. These include the Taos Pueblo Indian Water Rights Settlement, the Aamodt Litigation Settlement and the Navajo Water Settlement.

All of the changes to these settlements proposed in S. 1447 are technical in nature and reflect the original intent of Congress and the parties to the settlement. Technical corrections outlined in the bill include correction of spelling and numerical errors, and clarification on how funding for infrastructure projects can be used and how long funding will be available.

The technical corrections outlined in S. 1447 are important to continue to carry out the provisions of the Taos, Aamodt and Navajo water settlements. I understand the Administration supports the effort to make technical corrections to these settlements and is committed to working with me and the parties to the settlement to ensure that the changes are amenable to the parties.

I would urge the Administration to work quickly with the parties to resolve any concerns raised today. It is important that these corrections be made in a timely manner. Again, I thank the Committee members for their attention to this bill and would urge swift passage.

Thank you, Madam Chair, for acting on this so quickly.

The CHAIRWOMAN. Thank you.

We will now turn to our witnesses. First, I am going to have Assistant Secretary Washburn make his testimony. Thank you for being here today. Then maybe we will ask you questions and then continue down the line of our other witnesses.

**STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT  
SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE  
INTERIOR**

Mr. WASHBURN. Thank you, Madam Chairman. It is an honor to be here. Thank you, Senator Udall.

Let me first testify on S. 1219, the Pechanga Water Rights Settlement Act. I want to say that the Administration remains very committed in the second term to getting water rights settled for Indian tribes. This is very important for the Federal trust responsibility towards tribes. We remain very committed to doing so, as I said in my testimony before the Committee back in May, I believe it was, on the Blackfeet Water Settlement.

The Department is committed to working with the Pechanga Bands, the State of California, the local parties and this Committee in trying to get this water settlement completed. We are still in the process of analyzing S. 1219, and frankly, we are still negotiating with the tribe in some respects. So we are not stating a position of support at this point, but we want to congratulate the tribe and Chairman Maccaro for his leadership in working so well with the

water districts in his neighborhood and also with the other tribes that are in the Santa Margarita River Watershed.

We do have some issues that we have yet to work out with the Pechanga Band, and we are committed to working with Chairman Macarro to work through those issues. We appreciate his dialogue. We appreciate the Chairwoman and the Committee for moving the ball forward on this settlement. We have seen some progress since the last time this bill was filed, including, for example, just the decrease in the Federal contribution to the water rights settlement.

So things are moving in the right direction with this settlement. I will be happy to answer more specific questions about any remaining concerns that we have during my question and answer period.

Let me move on to the New Mexico Technical Amendments bill at this point. First of all, the Aamodt settlement, which benefitted the Nambe, Pojoaque, San Ildefonso and Tesuque Pueblos, I first would like to thank Senator Udall for his leadership in getting this very, very important water rights settlement through Congress and continuing to ensure that the settlements get attention, so that we can continue to make sure that they are finalized successfully and implemented successfully. We have been looking at these technical corrections and for the Aamodt litigation settlement, we see that it largely deals with indexing and costs for this bill. Indexing is very important, because the value of money changes over time, it usually lessens. And we have to make sure that the money has purchasing value, so we are able to complete these settlements.

So we are happy to look carefully at those provisions with your staff, Senator Udall, and see what we can do with regard to making sure that we are doing the appropriate thing with regard to the Aamodt water rights settlement.

As to the Navajo Water Settlement, Senator Udall, we are fully in favor of the things that you have recommended in the technical amendments bill for the Navajo Water Rights Settlement Act. I could go through them one by one, but I believe we are supportive of each of those changes, and happy to do that. Again, thank you for keeping your attention on this settlement as well, to keep it moving forward.

As to the Taos Pueblo Indian Water Rights Settlement, one of the things that this technical amendment does is deal with so-called early money, money that we get to the tribes before the settlement is final, so that they can begin projects. One of the things that your technical amendments do here is to expand the purposes for that early money. We have negotiated the purposes for the early money and those were careful negotiations. We generally, the Administration does not like to provide early money for several reasons, not least of which because it takes some of the pressure off getting the thing finalized. Once people start having money to spend, the pressure isn't so great to getting the settlement finalized and it has to go to the court and all that.

So we don't like to do it too much, but we are looking at your changes, your proposed changes, and we would be happy to talk to you more about those. I suspect you may have some questions, so let me stop there. I thank the Committee and Senator Udall for



your leadership on keeping these water settlements moving forward so that they will be successful.

Now, Chairwoman Cantwell, let me turn to S. 1448, the Spokane Bill. This is the bill that I am most well acquainted with, because I have been working on it for many months now. As you know, Grand Coulee Dam in the State of Washington is one of our Nation's most important hydroelectric resources. Our Country has been earning revenues from hydropower there for decades, and we have been using land and opportunities taken from two tribes, the Confederated Colville Tribes and the Spokane Tribe.

The Colville Tribes were compensated for their loss and the payments to the Colville Tribes have been a very important resource to the Confederated Tribes. They received \$53 million back in the 1990s, and have been receiving well over \$10 million a year since that time, since Congress enacted their settlement act.

The Colville Tribes obtained this settlement because they amended their Indian Claims Commission case to include a claim for lost hydropower revenues. They amended their claim many years after the date had expired to file new claims and long after the Spokane Tribe had already settled its claims in its own ICC, Indian Claims Commission case. As a result, it was not possible for the Spokane Tribe to then amend its case to bring these claims.

And so in essence, the Colville Tribes got their day in court, but the Spokane Tribe never really did. It is thus largely an accident of history that one tribe was compensated and another tribe was not compensated for the very same loss. While this outcome can be explained legally and historically, it is difficult to justify morally, frankly.

So for at least three reasons, the Administration is proud to announce today that it supports S. 1448. First, it is because it is the right thing to do. For the reasons mentioned above, the Spokane Tribe deserves equitable compensation for this taking of something from their reservation that has great value. Second, the Spokane Tribe has shown patience and engaged in good cooperation to try to reach a reasonable and just result.

The fiscal climate is not good for these sorts of settlements, as everybody knows. And I congratulate Chairman Peone and the rest of the council, some of whom are here today, and former Chairman Abramson, for their leadership, but also for being reasonable and hoping to obtain a fair result, but also one that is achievable in the current fiscal climate.

So finally, Chairwoman Cantwell, one of the other reasons I would add is your own persistence. You have filed a bill like this, this bill or one similar, in several past Congresses. I am proud to say, Chairwoman Cantwell, that I have personally worked on this issue with your very hard-working staff on a very regular basis since the beginning of this Congress. I congratulate you for your persistence.

I am not going to thank you for your patience, because I haven't seen much.

[Laughter.]

Mr. WASHBURN. But if there was any patience, I suspect it was used up with past inhabitants of my office. But I do want to thank your staff, because it has been an absolute joy to work with them

on basically a weekly basis since this Congress has begun. They deserve a lot of credit for moving this forward.

So on behalf of Secretary Jewell and the Administration, I am proud to support this bill. Thank you.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF HON. KEVIN WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

S. 1448, SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION EQUITABLE COMPENSATION ACT

Chairwoman Cantwell, Vice-Chairman Barrasso, and Members of the Committee, my name is Kevin Washburn, and I am the Assistant Secretary for Indian Affairs at the Department of the Interior. Thank you for the opportunity to present the Department's views on S. 1448, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act.

S. 1448 would provide a measure of justice for a historical wrong by providing equitable compensation to the Spokane Tribe for water power values from riverbed and upstream lands taken by the United States as part of the Grand Coulee Dam development in the 1930s and 1940s. The Tribe's claim is an equitable one because the Tribe missed its opportunity to make a legal claim with the Indian Claims Commission. In 1994, Congress remedied similar claims by the Confederated Tribes of the Colville Reservation which had been pending before the Indian Claims Commission. Although the Colville Tribes received compensation for their lost water power values, the Spokane Tribe never received similar compensation because they were foreclosed from doing so. While this outcome can be explained legally, it is difficult to justify morally.

S. 1448 utilizes a compensatory framework similar to the Colville settlement in an attempt to compensate the Spokane Tribe for the same type of damages for which the Colville Tribe was already compensated. Similar to the resolution achieved for Colville, S. 1448 would establish a Trust Fund in the Department of the Treasury and require the Secretary of the Interior to maintain, invest and distribute the amounts in the Trust Fund to the Spokane Tribe. S. 1448 provides a fair result for the Spokane Tribe. S. 1448 does not set a precedent for any other Federal hydropower facilities or installations because of the unique fact set presented by the development of Grand Coulee Dam as explained further below. The Administration supports S. 1448.

### Background

The Colville and Spokane Indian reservations were established in 1872 and 1877, respectively, on land that was later included in the state of Washington. The 155,000 acre Spokane Reservation was created by an agreement between agents of the federal government and certain Spokane chiefs on August 18, 1877. That Agreement was later confirmed by President Hayes' executive order of January 18, 1881.

The Grand Coulee Dam was constructed on the Columbia River in northeastern Washington State from 1933 to 1942 and when finished, the 550-foot high dam was the largest concrete dam in the world. It is still the largest hydroelectric facility in the United States. Lake Roosevelt, the reservoir created behind the dam, extends over 130 miles up the Columbia River and about 30 miles east along the Spokane River. The reservoir covers land on the Spokane Reservation along both the Columbia and Spokane rivers. The federal government, under a 1940 act, paid \$63,000 to the Colville Tribes, and \$4,700 to the Spokane Tribe for tribal land used for the dam and reservoir.

Subsequently, the Spokane Tribe and the Colville Tribes appeared before the Indian Claims Commission (ICC). The ICC was created on August 13, 1946, to adjudicate Indian claims, including "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Under section 12 of the Act, all claims had to be filed by August 13, 1951. Settlement awards of ICC claims were paid out of the U.S. Treasury.

The Spokane Tribe filed a claim with the ICC just days before the statutory deadline. The claim sought compensation for land ceded to the United States under an agreement dated March 18, 1887. It also asserted a general accounting claim. Both claims were jointly settled in 1967 for \$6.7 million and neither of the claims referenced the Grand Coulee Dam.

The Colville Tribes' claims with the ICC, also filed in 1951 and designated as Docket No. 181, included broad, general language seeking damages for unlawful

trespass on reservation lands and for compensation or other benefits from the use of the Tribes' land and other property. The Tribes' original petition did not specifically mention the Grand Coulee Dam. In November 1976, over 25 years after the original filing of Docket No. 181, and nearly a decade after the Spokane had settled its claims, the ICC allowed the Colville Tribes to amend their 1951 petition to seek just and equitable compensation for the water power values of certain riverbed and upstream lands that had been taken by the United States as part of the Grand Coulee Dam development.

In 1994, Congress recognized that the water power values were compensable and settled with the Colville Tribes, enacting the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act (P.L. 103-436, Nov. 2, 1994). The Act settled the claims filed in 1976 by the Tribes' amended petition. The Act provided the Colville Tribes a lump sum payment from the U.S. Treasury of \$53 million for lost hydropower revenues and, beginning in 1996, annual payments that have ranged between \$14 million and \$21 million for their water power values claim. The cost of the annual payments is shared between the Bonneville Power Administration, which markets the power generated at the dam, and the Treasury.

There is no dispute that the Spokane Tribe suffered a loss arising out of the same set of actions by the United States that formed the basis of the Colville Tribes' amended claims filed in 1976. The Spokane Tribe had settled its ICC claim nearly 10 years before the Colville Tribes were allowed to amend their ICC claims to include a specific water power values claim. Thus, when these water power claims were recognized by Congress in 1994 as valid, compensable claims, the Spokane Tribe's case had long since been settled and thus there was no vehicle for the Spokane Tribes to raise a similar claim. As a result, it is partly an accident of history that the Colville Tribes received compensation and the Spokane Tribe did not.

#### **S. 1448**

S. 1448, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act, is designed to provide the Spokane Tribe with an equitable and comparable compensation similar to compensation the Colville Tribes received almost two decades ago from the federal government for the Colville Tribe's lost water power values. S. 1448 establishes a Recovery Trust Fund and directs the Secretary for the Department of the Treasury to deposit \$53 million into the fund. The Secretary of the Department of the Interior is directed to maintain, invest, and distribute the funds to the Spokane Tribe after the Spokane Tribe submits a distribution plan to the Secretary of the Department of the Interior. We note that expenditure of these funds would be subject to the Statutory Pay-As-You-Go Act of 2010.

S. 1448 provides that the Bonneville Power Administration (Bonneville) shall pay to the Spokane Tribe an annual amount equal to 25 percent of the Computed Annual Payment, defined in the bill as certain payments calculated pursuant to provisions of the Coleville Settlement Agreement, for FY 2013 and provides for subsequent payments to the Spokane Tribe, from 2015 to 2023, 25 percent of the Computed Annual Payment for the preceding fiscal year, and from 2024 and each year thereafter, an amount equal to 32 percent of the Computed Annual Payment for the preceding fiscal year. The bill, starting in 2023, also provides Bonneville with \$2.7 million in interest credits from the Department of the Treasury for every year that Bonneville pays the Spokane Tribe pursuant to this legislation. These percentage payments by Bonneville and interest credits to Bonneville are the same as in the previous versions of the bill and therefore the Department has no concern related to these percentages or interest credits, nor the duration of payments to be made by Bonneville to the Spokane Tribe. Finally, the bill includes a provision extinguishing all monetary claims by the Spokane Tribe regarding the Grand Coulee Dam project.

In the 112th Congress, the Department expressed concern with Section 9(a) of S. 1345, which was the bill introduced during the 112th Congress to address this issue. While the Department supported the concept of providing a clear delegation of authority to the Tribe to achieve its law enforcement goals, the Department was concerned that the language was broad and could be construed to delegate more than just the authority intended by the Tribe. The Department's concern has been addressed with the removal of former Section 9(a) of S. 1345.

Although the Administration did not support previous legislation, in part, because the Tribe had not established a legal claim to settle, the Administration supports equitably compensating the Spokane Tribe for the losses it sustained as a result of the federal development of hydropower at Grand Coulee Dam. The facts and history show that as a matter of equity the Spokane Tribe has a moral claim to receive compensation for its loss. The compensation provided by S. 1448 is commensurate with

the compensation provided to the Colville Tribes for the losses arising out of the same actions. The Department supports S. 1448.

S. 1219, THE PECHANGA BAND OF LUISEÑO INDIANS WATER RIGHTS SETTLEMENT ACT

Good afternoon Madam Chairwoman, Vice-Chairman Barrasso, and Members of the Committee. My name is Kevin Washburn. I am the Assistant Secretary for Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's views on S. 1219, the Pechanga Band of Luiseño Indians Water Rights Settlement Act, which would provide approval for, and authorizations to carry out, a settlement of all water rights claims of the Pechanga Band of Luiseño Indians (Band) in the Santa Margarita River Basin in southern California. At this point, we are unable to support S. 1219. However, based on the progress by the parties to date, the Administration is committed to achieving a settlement that can be supported by all parties.

### **I. Introduction**

Negotiating settlements of Indian water rights claims has been and remains a high priority for this Administration. Indian water rights settlements help to ensure that Indian people have safe, reliable water supplies and are in keeping with the United States' trust responsibility to tribes. They promote cooperation in the management of water resources and encourage communities to work together to resolve difficult water supply problems. The Administration's policy on negotiated Indian water settlements has been set forth in detail in our support for the settlements enacted into law in the Claims Resolution Act of 2010, Pub. L. No. 111-291 (Dec. 9, 2010), which benefitted seven tribes in three different states, and in the testimony I gave before this Committee in May 2013 on the proposed Blackfeet Water Rights Settlement Act of 2013. I will not restate this policy or the principles that underlie it, except to note that Secretary Jewell continues to make the negotiation and implementation of Indian water rights settlements a high priority for the Department. The Department understands that Indian water rights and related resources are trust assets of tribes, that water rights settlements enable the Federal government to protect and enhance those assets, and that when Congress enacts an Indian water rights settlement it is fulfilling its unique obligation to Indian tribes. The Department is committed to working with the Band, the State of California, the local parties, this Committee, and the sponsors of S. 1219 to craft a settlement that we all can support.

The Department is still in the process of analyzing S. 1219 and is able to offer only preliminary comments on the bill at this time. Before I discuss the settlement agreement and address Federal concerns, however, I do want to recognize the significant efforts of the Band over many years to protect its water rights and to secure a safe and adequate supply of water for its community. These efforts have led to this proposed settlement, which reflects a creative and cooperative approach to solving problems of water supply and water quality on and near the Pechanga Reservation. One of the most positive features of this settlement is how it builds upon prior agreements to establish a long term cooperative arrangement for sustainable ground water management in the Santa Margarita basin.

S. 1219 would approve a settlement negotiated among the Band and the Rancho California Water District (RCWD), the Eastern Municipal Water District (EMWD), the Metropolitan Water District (MWD), and the United States. The settlement would resolve water rights claims for the Band that the United States brought nearly 60 years ago in *United States v. Fallbrook Public Utility District*, the general stream adjudication of the Santa Margarita river system. The United States also brought water rights claims for two other Indian tribes in the same river system, the Cahuilla Band of Mission Indians and the Ramona Band of Cahuilla Mission Indians. Separate settlement discussions are underway with respect to those claims and our Federal Team, which has been in place since 2008, is working closely with each of the Bands.

### **II. Federal Concerns**

We testified about the complexity of this settlement and the issues that need to be addressed on September 16, 2010. I won't repeat our testimony on that earlier version of the legislation, H.R. 5413, other than to say that we will continue to analyze those issues as well as the related issue of non-Federal cost share. S. 1219 includes some positive changes and we appreciate that the Band is willing to work with the Department to address our concerns, including our concerns with Federal obligations, cost, cost share, water quantity, and water quality.

The proposed legislation would recognize a Federal reserved water right in the Band in the amount of 4,994 acre feet, to be made up of water from various sources,

including imported water and recycled water that would be furnished under contracts between the Band and the local parties. These various sources include (1) 1,575 afy of local groundwater; (2) 525 to 700 afy of imported recycled water; and (3) up to 3,000 afy of imported potable water. S. 1219 calls for a Federal settlement contribution of \$40.19 million for a number of purposes, including \$12.23 million to assist the Band in purchasing potable water imported from MWD and \$27.96 million for infrastructure that would treat and deliver imported recycled and potable water to the Reservation.

Overall, the requested Federal monetary contribution in S. 1219 is down just over \$10 million from prior versions of the legislation (\$50.242 million to \$40.192 million). Other changes in the legislation include the elimination of the demineralization and brine disposal facility, which had been a critical element of the settlement previously. Funding for that facility now appears to have been transferred to a general water quality account “to fund groundwater desalination activities” by the Band. The Department has requested that the Band provide more information about the rationale supporting these changes.

In addition, the Band’s Reservation also includes a small portion of land in the San Luis Rey watershed. In the interest of achieving a comprehensive settlement of all of the Bands water rights claims, we are weighing whether principles of finality would better be achieved by including water rights for that parcel of land in the settlement.

Because of scarcity and tremendous competition, water rights in southern California are extremely expensive. In these circumstances, great care must be given to the decision to include imported and recycled water as part of the Band’s Federal reserved water rights. We are continuing to examine cost and other issues associated with how the settlement treats imported water. While we are unable to support S. 1219, based on the progress by the parties to date, the Administration is committed to working with the Band and the local parties to achieving a settlement that can be supported by all parties.

### III. Conclusion

The Pechanga Band and its neighbors are to be credited for working towards a negotiated settlement of their dispute over water rights. After years of litigation, this settlement lays out a potential framework for resolving the Band’s Federal reserved water rights claims, and achieving other goals such as managing groundwater, addressing water quality issues, and alleviating water shortages in the basin.

We look forward to working with the Band and the local parties to finalize a settlement that appropriately secures the Band’s water rights and defines clearly the roles and responsibilities of each party to the settlement.

#### S. 1447, NEW MEXICO NATIVE AMERICAN WATER SETTLEMENTS TECHNICAL CORRECTIONS ACT

S. 1447, the New Mexico Native American Water Settlements Technical Corrections Act, proposes amendments to three Indian water rights settlements: the Taos Pueblo Indian Water Rights Settlement Act (Public Law 111–291) (Taos Settlement Act); the Aamodt Litigation Settlement Act (Public Law 111–291) (Aamodt Settlement Act); and the Navajo water rights settlement provision of the Omnibus Public Land Management Act of 2009 (Public Law 111–11) (Navajo Settlement Act).

Some of these proposed amendments are minor, consisting of corrections in spelling and section numbering. Other amendments are more substantive and could have budgetary impacts. The Department of the Interior continues to be fully committed to implementing these Congressionally enacted water rights settlements, and we recognize and appreciate that the goal of this bill is to make targeted fixes to these statutes in order to facilitate implementation. Many of the amendments proposed in the bill are helpful and could make the work of the implementation teams on the ground much easier by eliminating unclear language in the original enacted bills.

However, at this time the Department and its sister agencies have not yet completed a full assessment of the potential impacts of this legislation, particularly the budgetary and fiscal impacts. Once we complete this analysis, if there are provisions that the Administration does not support as currently drafted, we would welcome the opportunity to work with the sponsors and bill proponents to address out concerns. The changes to each settlement proposed by S. 1447 are discussed below.

#### Aamodt Litigation Settlement

The Aamodt Settlement Act provides for indexing of mandatory appropriations in two places, Sections 617(a) and (c). Like the provisions in the Taos Settlement Act, discussed below, both of these provisions would allow for multiple indexing adjust-

ments over a specified period of time—between Fiscal years 2011 and 2016. Section 3(b)(1) of S.1447 would remove these time limitations.

The Department believes that indexing continuing throughout the construction period (ending in 2024) for the municipal water system that is the center of this settlement could help to ensure complete implementation of this settlement. The current limitations on indexing could put completion of the water system and, thus, the settlement itself, in jeopardy. However, at the same time we believe that the changes in indexing will have impacts on the Treasury and could trigger mandatory offset requirements. As noted above, the Administration is still reviewing this legislation and therefore is not taking a position on these provisions at this time.

The elimination of any reference to years for indexing of the Aamodt Settlement Pueblos' Fund in Section 3(b)(2) of S. 1447 may have a similar effect but analysis of this proposed provision is complicated by virtue of other cost adjustment provisions. Additionally, we note that section 615 of the Aamodt Settlement Act provides that the funds appropriated under section 617(c) are to be invested by the Secretary of the Interior following the date the waivers become effective under section 623 of that Act. After section 623 is triggered, the funds would be earning interest, which will help maintain the purchasing power of the funds and make indexing less necessary.

Finally, section 3(a) of the bill refers to "Section 615(c)(7)" of the Settlement Act. Because there is no section 615(c)(7) in the Act, we assume this should be a reference to "Section 615(d)(7)". The goal of this language seems to be to allow the Tribe to use its OM&R fund earlier in some situations, but always after the enforceability date. The Department has no objection to this particular provision.

#### **Navajo Water Settlement**

Section 4 of S. 1447 would amend the Navajo Settlement Act in several respects. The first two amendments are non-substantive in nature and are supported by the Department.

Section 4(c) of the bill would amend section 10604(f)(1) to allow the Navajo Nation to begin receiving groundwater (non-project water) through Project facilities without triggering the 10 year operation and maintenance (O&M) payment waiver provision of Section 10603(c)(2)(A) of the Settlement Act. This amendment benefits the United States in that it would prevent the Navajo Nation from requesting O&M payment waivers (which would require the Department to pay O&M costs) until Project water from the San Juan River is delivered to the Navajo Nation. The Navajo Nation has the responsibility for paying O&M costs of non-Project water delivery under Section 10602(h)(1) of the Settlement Act.

Section 4(d)(1) of the bill would amend Section 10609 of the Settlement Act to allow funding identified for the Conjunctive Use Wells in the San Juan River Basin and in the Little Colorado and Rio Grande Basins to be used for planning and design as well as construction and rehabilitation of wells. Without the amendment only construction and rehabilitation are authorized uses of the funds. Because costs are capped, this change will have no effect on the final costs of the settlement. The Department believes that using this funding for planning and design is useful, since only a coarse level of planning, and no design work, has been done for these wells.

Section 4(d)(2) of the bill would amend the Settlement Act by increasing the amount of Project funding that can be spent on cultural resources work from two to four percent of total project costs. The Project area is rich in cultural resources and significant work must be done in this area, so the proposed increase appears to be reasonable and appropriate. Correspondingly, section 4(d)(3) would reduce the percentage of funds that may be spent on fish and wildlife facilities from four percent to two percent. Based on current information, this change also appears to be reasonable and appropriate. Both of these proposed changes are consistent with the Project cost estimate included in the FEIS and, when taken together, they do not increase the cost of the Project.

Finally, section 4(e) of the bill would correct language in the Settlement Act that, absent amendment, could be interpreted to mean that the court in the stream adjudication had jurisdiction over the Project contract between the United States and the Navajo Nation. The Department supports this clarification which comports with existing law.

#### **Taos Pueblo Indian Water Rights**

S. 1447 proposes to amend two provisions of the Taos Settlement Act. Section 2(a) of the bill would modify Section 505(f)(1) of the Taos Settlement Act by expanding the list of allowable purposes for which \$15,000,000 in "early money" provided by Section 505(f) could be used. The Section 505(f) funding made available for immediate expenditure by Taos Pueblo represents an exception to the Department of the

Interior's general policy that all settlement benefits should flow at the same time, only after settlement enforceability conditions are met.

Accordingly, the purposes for which the money could be spent under Section 505(f) were carefully negotiated with the Pueblo to make some funds available to the Pueblo for specific high priority purposes, such as protection of sacred wetlands known as the Buffalo Pasture and purchase of State-based water rights that are rapidly increasing in cost. Expanding the purposes for which "early money" can be expended removes the distinctions between Section 505(f) and Section 505(a), which sets forth the full list of allowable purposes for which the Taos Pueblo Water Development Fund can be expended once the settlement is final and enforceable. The Administration wishes to work with the Pueblo and the bill's sponsors to determine exactly what problems the Pueblo needs to address.

The second amendment to the Taos Settlement Act is a proposed change to the indexing of mandatory appropriations for settlement funding in the current version of the Act. Section 509(c)(1) of the Act provides that mandatory appropriations are subject to indexing but allows such indexing only between fiscal years 2011 and 2016. S.1447 would remove the time limitations for indexing.

The Administration is still analyzing this amendment but believes that the changes in indexing will have impacts on the Treasury and could trigger mandatory offset requirements. Moreover, we note that section 505 of the Taos Settlement Act provides that the Fund at issue is to be invested by the Secretary of the Interior following the enforceability date of the settlement. Therefore, the funds at issue will already be able to earn interest beginning not later than 2017, which will help maintain the purchasing power of the funds provided and make indexing less necessary.

The final amendment to the Taos Settlement Act would remove the requirement contained in Section 509(c)(2)(A)(i) that \$16,000,000 of mandatory funding for grants to non-Indian parties be transferred from Treasury between fiscal years 2011 and 2016. The full \$16,000,000 has already been transferred from Treasury to the Bureau of Reclamation and will be available for distribution upon the enforceability date of the settlement. The Department believes that the purposes of this amendment have already been achieved.

### Conclusion

The Department agrees that technical amendments to the Taos, Aamodt and Navajo Settlement Acts should be made. We stand ready to work with the sponsors, the bill proponents and this Committee to craft a technical corrections bill that accomplishes the goals of the sponsors in a manner that the Administration fully supports.

This concludes my statement and I am happy to answer any questions the Committee may have.

The CHAIRWOMAN. Thank you, Assistant Secretary Washburn, and thank you for your testimony today on all three bills, and for your hard work. Obviously, these water rights settlements are time-consuming. They involve a lot of history and a lot of sorting out of policy. We appreciate the challenges on all of them. But we also know that in many instances, these communities are coming to us with a resolution that is a much better process than legal battles over many, many decades. So thank you for your hard work.

Thank you for your support of the Spokane bill. You are right, it has passed this Committee, it has passed the Senate, it has passed the House, it has just never passed both houses at the same time. So maybe this Congress will be a charm.

I wanted to ask you about obviously the settlement issue. I think in your written testimony you mentioned complying with pay-go. What are your thoughts on the current account that Interior has for these funds and the compensation source?

Mr. WASHBURN. Well, let me say, that is to the hard question. You put your finger on it. We are happy to work with you to try to find offsets. We will have to figure out how to pay for this settlement. It is the right thing to do and I hope that we can do so. I know that you have used different approaches over the past few

Congresses to try to figure out ways to make this occur. And whether we do it at one-time funding or over the course of years, your staff and I have talked about the different approaches to try to pay for it. We will be looking for offsets. I am sure the CBO is going to score this bill and we will have to find the money where we can.

But we want to have the bill in a place where, if it is possible to find that funding, we can get it done. That is why I thank you for holding this hearing today.

The CHAIRWOMAN. With the Colville, obviously the settlement was both a compensation and a continued fund. That is the same way you would expect this to work as well?

Mr. WASHBURN. That is the same structure, Chairwoman. It is very equitable, it is very similar to the structure, I think, that the Colvilles received. That seems like the fair way to do it.

The CHAIRWOMAN. Okay. But you don't see, is this an issue that you think can be resolved before the end of the year?

Mr. WASHBURN. You know, I have been around long enough to know that a lot of these things don't happen until the very end of a Congress, sometimes. Usually they don't go alone. It is probably unlikely to happen with a freestanding bill.

The CHAIRWOMAN. No, I am asking, the resolution between the Department of Interior and those interested in the legislation on a funding source, a mechanism.

Mr. WASHBURN. Well, I think that is both a problem for us over at OMB, and it is a problem for the CBO and the people within Congress that have to finance the bill. I pledge to work with you on that. I don't know what the final resolution will be, but we do pledge to keep the dialogue going to figure out ways to do that.

The CHAIRWOMAN. Okay. Let me turn to my colleague from New Mexico for his questions. Senator Udall?

Senator UDALL. Thank you, Madam Chair, very much.

Assistant Secretary Washburn, I really appreciate your willingness to work on these in a timely fashion and move through them quickly. In your testimony, you express a commitment to work with my office and the parties to the three New Mexico settlements to resolve any outstanding issues in S. 1447. And can I get an assurance these these discussions will be carried out in a timely fashion and move along so that we can get this bill marked up and going?

Mr. WASHBURN. Absolutely, Senator Udall. I have Letty Belin, with the with the Secretary's Indian Water Rights Office here, and I will give you her assurance as well. I will put the words in her mouth, as well as Fain Gildea and Pam Williams who are here with us. We have the whole team here and we do commit to you that we will be as responsive as we possibly can. We share your desire to see these implemented successfully. Again, thank you for your leadership on that.

Senator UDALL. Thank you very much. To ask now about Taos and Aamodt, in your testimony you express concern about the changes to the dates related to mandatory funding of the Taos and Aamodt settlement made in S. 1447. How much of the mandatory funding for these settlements has already been transferred to the Treasury, to the Bureau of Reclamation? Specifically, how much of the mandatory funding for the following, for the Taos Pueblo Water



Development Fund, for the regional water system associated with the Aamodt settlement, and for the Aamodt settlement water systems operations maintenance?

Mr. WASHBURN. Thank you, Senator Udall. I believe that a total of \$50 million in mandatory funds has been transferred to the BIA from the Treasury to be managed as that project develops. And \$60 million in mandatory funds for the Mutual Benefits Projects to the Bureau of Reclamation for the Taos Pueblo Water Development Fund. For the regional water system associated with the Aamodt settlement, I believe that the Bureau of Reclamation has received \$56.4 million in mandatory funding for that regional water system. And finally, for the Aamodt settlement O&M, operation and maintenance funds, Reclamation has received \$5 million in mandatory funding for those O&M costs.

Senator UDALL. And can you describe how the indexing issue you outline in your testimony will continue to be an issue where the mandatory funding has already been transferred?

Mr. WASHBURN. I will, Senator, as best I can. Let me say I think we are going to have to get back to you with some of the answers here. The problem for us is not unlike the one that Chairwoman Cantwell raised, which is that paying for these things is an issue. When you change the indexing for mandatory funds that have already been transferred, you may increase the costs for that money. So that is where we have to figure out if there need to be offsets, if there will be scoring for this indexing. And we are trying to identify that.

It could very well increase the costs. So if it does that, we have to find the money and CBO has to find the money. We have to figure out where the money is coming from. So those are the remaining questions that we are trying to answer.

Senator UDALL. Great. Thank you very much. We may have some additional technical questions to submit to you for the record, too, for answers. I hope you will answer those also. I am sure you will.

Mr. WASHBURN. I would be happy to. Thank you.

Senator UDALL. Thank you. Thank you, Madam Chair.

The CHAIRWOMAN. Thank you.

Now let's turn to the rest of the witnesses. We will start with you, Mr. Chairman from the Spokane Tribe, Mr. Rudy Peone. I know that you are accompanied by Ms. Marian Wynecoop. I don't know if you both are going to testify. Anyway, I will turn it over to you.

**STATEMENT OF HON. RUDY J. PEONE, CHAIRMAN, SPOKANE TRIBE OF INDIANS; ACCOMPANIED BY MARIAN WYNECOOP, TRIBAL ELDER**

Mr. PEONE. Thank you, Chairwoman Cantwell. I sure appreciate the time here today.

I do want to echo what Assistant Secretary Kevin Washburn did say, you have been a champion and a stalwart for us. I really appreciate that, along with various other members of your Committee, Senator Udall, Senator Murray as well. I really appreciate that. And hearing that from the Assistant Secretary was great.

So yes, Ms. Wynecoop and myself will both be testifying today. I have a whole laundry list of folks that wish they could testify. We understand they can't. So we are going to do the best we can.

We already submitted a 64-page document, recapping the history and justifying this equitable settlement to the tribe. I am here today as a leader of the Spokane Tribe, just under 3,000 members, not counting other tribal members that live with us, among us, married to us, spouses, descendants. That number grows exponentially three or four times over. And this is a decades-long issue for us. We are approaching a century of dealing with this now.

What you will hear from Marian, to my left, is from an elder who lived on that river. She was born and raised and went from a lifestyle of using that river and everything it provided from the salmon to the orchards, everything, to where we are now.

I also have, who is not going to be able to testify, behind me, Vy Seymour, another elder. She can testify to some of those same things if she had the chance. Here is an elder who was living on the property and her parents took them up on the hill, where they were teaching them how to swim, brought them up on the hill, and they actually watched the water rise and engulf their home, their foundation.

So these are things that leaders before me have been coming back here requesting, demanding, fair, honorable dealing in a settlement to our tribe.

I wasn't alive, these people were. They lived it, they lived through it. It almost brought a tear to my eye listening to Assistant Secretary Kevin Washburn state their support. Because we have been so close. Ever since, I think it was the 106th Congress, we have been introduced every time since on the House side, on the Senate side. We have been approved, like you said, once on the House, once on the Senate, but never at the same time. We are hoping that the work we have been doing, the work you and your staff have been doing, the work that the Administration has been doing, the compromises that my people are making to try to get this bill settled. It is difficult, and it gets more and more difficult when I am asked by my elder members the status of this settlement.

Time after time, that number grew smaller. Well, today, I have a couple of elders with me. And one of them gets to speak, hopefully after this they will get to speak with some staff or if other Committee members come in, we would love to pull their ear on that.

I have some other folks who traveled with me. Two councilmen, Greg Abrahamson and Bear Hughes. I also have two other tribal members, Marsha Wynecoop runs our language program, and Cheryl Butterfly, who works in our culture program. Cheryl, for example, some of the work that they do, they are, with the fluctuation of Coulee Dam and bones are exposed, or when they have it, they are the ones that are down there, they are the ones that are repatriating our ancestors. Vy is also one of the ones, the elders that are there, saying prayers for these people, these tribal members, when we repatriate them. They have so much to offer, so much to talk about.

But they are the reason we are here. I don't come back here as Rudy Peone, I don't come back here as chairman, I come back here for my people. That is what our leaders have been doing for years. The concessions we are making with the back pay, for example, with the jurisdiction, the land ownership, we are willing to do that because of the difficulty we have had to see resolution to this issue. We want to see it done.

The Spokanes have waited long enough. We are not going to go away. I myself am a competitor, a runner. I do cross country. I always have, I love that. And that is a long race, and this has been a long fight that my people have been in. I am willing to see it through. So any extra time I have, I will allocate to my elder, Mar-ian. I would like her to discuss a little bit about her life on the river.

[The prepared statement of Mr. Peone follows:]

PREPARED STATEMENT OF HON. RUDY J. PEONE, CHAIRMAN, SPOKANE TRIBE OF INDIANS

S. 1448 THE SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION GRAND COULEE DAM EQUITABLE COMPENSATION ACT

September 10, 2013

Thank you Chairwoman Cantwell and members of the Committee. My name is Rudy J. Peone. I serve as Chairman of the Spokane Tribe of Indians. I very much appreciate the opportunity to appear before the Senate Committee on Indian Affairs to testify on S. 1448. Accompanying me and honoring the Spokane Tribe today is Marian Wynecoop, a Spokane Tribal Elder who was alive to witness the initial inundation of our Reservation for Grand Coulee hydro storage and the complete loss of our Tribe's salmon fishery. She will tell her story to the Committee.

SUMMARY

I am here today on behalf of the Spokane Tribe to respectfully ask that the Congress finally treat the Spokane Tribe fairly and honorably for the flooding of our reservation lands for the production of hydropower and for injury to our homeland, our tribal economy, our culture, and ultimately our Spokane people. The Grand Coulee's waters flooded the lands of two adjoining Indian reservations that held great economic, cultural and spiritual significance for the people residing thereon. Ours is one of those reservations. The other is the Colville Tribes Reservation.

Our life, culture, economy and religion centered around the rivers. We were river people. We were fishing people. We depended heavily on the rivers and the historic salmon runs they brought to us. Neighboring tribes referred to us as "the Salmon Eaters." The Spokane River, which was named after our people, was and continues to be the center of our world. We know it as the Path of Life. President Rutherford B. Hayes in 1881 recognized the importance and significance of the rivers by expressly including the entire adjacent riverbeds of the Spokane and Columbia Rivers within our Reservation. But the Spokane and Columbia Rivers are now beneath Grand Coulee's waters. Today our best lands and fishing sites lie at the bottom of Lake Roosevelt.

The proposed Legislation is designed to end a lengthy chapter in American history, in which the United States and American citizens reaped tremendous rewards at the expense of the Spokane Tribe and the Confederated Tribes of the Colville Reservation. The severe devastation wrought upon both tribes was unprecedented. And though the affected land areas held by the Spokane Tribe were roughly only 40% of that held by the Colville Tribes, a portion of the Colville's salmon fishery continues to reach their Reservation, while the Spokane's fishery was lost entirely. Additionally, the

Spokane lost forever a prime site on the Spokane River that it could have developed for hydropower. Ultimately, both Tribes suffered severely. We continue to be greatly impacted by the operation of Grand Coulee Dam each and every year.

Prior to its construction, during its operation and with the completion of the Third Powerplant in 1974, the United States acknowledged and supported its responsibility to fairly and honorably address the losses to be suffered by the Spokane Tribe as well as the Colville Tribes related to Grand Coulee. The Colvilles secured a settlement with the United States in 1994, while the Spokane claims are still unresolved. This legislation is consistent with Congressional policy towards tribes impacted by federal hydro projects, as reflected in the Colville Settlement and legislation enacted between 1992 and 2000 to provide additional, equitable compensation for the Sioux Nations impacted by the Pick Sloan Project.<sup>1</sup>

Finally, I would like to thank Senator Cantwell for sponsoring our Bill. We were here during the last Congress to testify in support of S. 1345, only to have the Administration raise somewhat belated concerns over certain provisions of that Bill. Under Senator Cantwell's strong leadership, and with the tireless efforts of her staff, we have worked hard with the Administration and stakeholder agencies to address those concerns. For instance, the land and jurisdictional transfer provisions of prior bills have been removed and the amount of back pay has been cut nearly in half. My Tribe made these difficult decisions in hope of finally receiving complete compensation for the inundation of our lands and destruction of our salmon fishery.

#### HISTORICAL CONTEXT

From time immemorial, the Spokane River has been the heart of Spokane's aboriginal territory.

In 1877, an agreement was negotiated between the United States and the Spokane to reserve for the Tribe a portion of its aboriginal lands approximating the boundaries of the present Spokane Indian Reservation.

On January 18, 1881, President Rutherford B. Hayes issued an Executive Order confirming the Agreement, and with exacting language, expressly included the Spokane and Columbia Rivers within the Spokane Indian Reservation.

Section 10(e) of the Federal Power Act (16 U.S.C. 803(e)) requires that when licenses are issued for a hydropower project involving tribal land within an Indian reservation, a reasonable annual charge shall be fixed for the use of the land, subject to the approval of the Indian tribe having jurisdiction over the land. Had a state or a private entity developed the site as originally contemplated, the Spokane Tribe would have been entitled to a reasonable annual charge for the use of its land. The Federal Government is not subject to licensing under the Federal Power Act.

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<sup>1</sup> See Attachment 1 (July 22, 2013 Letter from Chairman Peone to Senator Cantwell) and Attachment 1A, a spreadsheet showing legislation providing equitable compensation for the Colville Tribes and the Pick Sloan Tribes for flooding to reservation lands from Federal Hydro Projects.

Numerous statements made by federal officials acknowledged the need for the Spokane Tribe to receive fair compensation for the use of its land and water. In one example, William Zimmerman, Assistant Commissioner of Indian Affairs, wrote:

*"the matter of protecting these valuable Indian rights will receive active attention in connection with applications filed by the interested parties before the Federal Power Commission for the power development."*<sup>2</sup>

A letter approved by Secretary Ickes, from Assistant Commissioner Zimmerman to Dr. Elwood Mead, Commissioner of Reclamation, stated in connection with the "rights of the Spokane Indians," that the Grand Coulee project, as proposed:

*"shows the cost of installed horsepower to be reasonable and one that could bear a reasonable annual rental in addition thereto for the Indians' land and water rights involved."*<sup>3</sup>

The United States Department of Justice has recognized these promises as an undertaking of a federal obligation, which promises were made to both the Colville and Spokane Tribes.

*"The government began building the dam in the mid-1930's. A letter dated December 3, 1933, to the Supervising Engineer regarding the Grand Coulee and the power interests of the Tribes, with the approval signature of Secretary of the Interior Ickes states:*

*This report should take into consideration the most valuable purpose to which the Indians' interests could be placed, including the development of hydro-electric power.*

*We cannot too strongly impress upon you the importance of this matter to the Indians and therefore to request that it be given careful and prompt attention so as to avoid any unnecessary delay.*

*Also, a letter dated December 5, 1933, to the Commissioner of the Bureau of Reclamation and endorsed by Interior Secretary Ickes, stated that 'it is necessary to secure additional data before we can advise you what would constitute a reasonable revenue to the Indians for the use of their lands within the [Grand Coulee] power and reservoir site areas.' And a letter dated June 4, 1935 from the Commissioner of the Bureau of Reclamation requested that additional data be secured to determine 'a reasonable revenue to the Indians for the use of their lands within the power and*

<sup>2</sup> Letter from William Zimmerman to Harvey Meyer, Colville Agency Superintendent, dated September 5, 1933.

<sup>3</sup> Letter from William Zimmerman to Elwood Mead, dated Dec. 5, 1933.

*reservoir site areas.*<sup>44</sup>

As stated in the testimony of the Assistant Secretary for Indian Affairs, concerning the 1994 Colville Settlement legislation, approved in P.L. 103-436: "Over the next several years the Federal Government moved ahead with the construction of the Grand Coulee Dam, but somehow the promise that the Tribe would share in the benefits produced by it was not fulfilled."

Pursuant to the Act of June 29, 1940 (16 U.S.C. 835d et seq.), the Secretary paid to the Spokane Tribe \$4,700. That is the total compensation paid by the United States to the Spokane Tribe for the use of our tribal lands for the past seventy-five years.

When the waters behind the Grand Coulee Dam began to rise, the Spokane people were among the most isolated Indian tribes in the country. The Tribe's complete reliance on the Spokane and Columbia River system had remained largely intact since contact with non-Indians. That, however, would be completely and irreversibly changed forever. The backwater of the dam, Lake Roosevelt, floods significant areas of the Tribe's Reservation, including the Columbia and Spokane boundary rivers within the Reservation. A 1980 Task Force Report to Congress explains the historical context of the Tribe in relation to the Grand Coulee Dam:

*"The project was first authorized by the Rivers and Harbors Act of 1935 (49 Stat. 1028, 1039). In spite of the fact that the Act authorized the project for the purpose, among others, of 'reclamation of public lands and Indian reservations . . .,' no hydroelectric or reclamation benefits flow to the Indians. Hardly any were employed at the project site. Indeed, the Tribes have presented evidence that even unskilled workers were recruited from non-Indian towns far away. The irrigation benefits of the project all flowed south ...*

*Furthermore, the 1935 enactment made no provision for the compensation of the [Spokane and Colville] Tribes. It was not until the Act of June 29, 1940 (54 Stat. 703) - seven years after construction had begun - that Congress authorized the taking of any Colville and Spokane lands . . . Section 2 [of that Act] required the Secretary to determine the amount to be paid to the Indians as just and equitable compensation. Pursuant to this authorization the Secretary condemned thousands of acres of Indian lands, primarily for purposes of inundation by the planned reservoir.*

*Apart from the compensation for those lands, which the Tribes claim was inadequate, no further benefits or compensation were paid to the Indians. Nothing was provided for relocation of those Indians living on the condemned lands; and tribal lands on the bed of the original Columbia River were not condemned at all. Worst of all,*

<sup>44</sup> Statement of Peter R. Steenland, Appellate Section Chief, Environment and Natural Resources Div., Dept. of Justice: (Joint Hearing on S.2259 before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994, at 16).

*Grand Coulee Dam destroyed the salmon fishery from which the Tribes had sustained themselves for centuries. The salmon run played a central role in the social, religious and cultural lives of the Tribes. The great majority of the population of the Tribes lived near the Columbia and its tributaries, and many were driven from their homes when the area was flooded. While Interior Department officials were aware that the fishery would be destroyed, the technology of the time did not permit construction of a fish ladder of sufficient height to allow the salmon to bypass towering Grand Coulee Dam.*

*The project also resulted in the influx of thousands of non-Indian workers into the area. Prior to contemplation of the project very few non-Indians lived in the region. Indeed, anthropologist Verne F. Ray, who began his field studies in 1928, reports that there were no more than a handful of white families in the vicinity of the future site of the Grand Coulee Dam, and that in 1930 the Colville and Spokane were among the most isolated Indian groups in the United States. Their aboriginal culture and economy were largely intact up to that time, little reliance having been placed on white trading posts. The subsistence economy of the Indians had continued to focus on the salmon.*

*Another principal aboriginal pursuit of the Colville and Spokane Indians involved the gathering of roots and berries on lands south of the rivers. That activity was largely curtailed after the construction of the project because of the influx of non-Indians on to those southern lands and because the river was widened to such an extent that crossing it became very difficult. Before the reservoir there were many places where the river could be forded. Similarly, hunting south of the river was also curtailed. Thus, the Grand Coulee project had a devastating effect on their economy and their culture.”<sup>5</sup>*

The salmon runs were entirely and forever lost to the upstream Spokane Tribe. Furthermore, there existed on the Spokane River – within the Spokane Reservation – two prime dam sites the Spokane Tribe could have used for generating hydroelectric power. Like the Spokanes’ salmon runs, these sites were lost forever to Grand Coulee.

In the 1940 Act, Congress also directed the Secretary of the Interior to “set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife.” 16 U.S.C. § 835(d).

In an extraordinary move, the Tribe in December, 1941, sent a delegation cross-country to meet on the issues with Commissioner John Collier. Unfortunately, the meeting took place on December 10

<sup>5</sup> Final Report, Colville/Spokane Task Force, Directed by the Senate Committee on Appropriations in its 1976 Report on the Water and Power Public Works Appropriations Bill, S.Rep.94-503. (September, 1980).

— just three days following the bombing of Pearl Harbor. The Commissioner and his representatives committed to the Tribal delegation they would do all they could in aid of the Tribe, but that the national priorities of war meant that redress would have to wait until its conclusion.

In 1946, the Interior Secretary designated areas within Lake Roosevelt as "Indian Zones" to fulfill the requirements of the 1940 Act's "paramount use" provisions in recognition of tribal lands inundated by Lake Roosevelt. The "Spokane Indian Zone" and the "Colville Indian Zone" were located generally within the reservations of those Tribes. The Spokane Zone also extended up the inundated Spokane River, within the Spokane Reservation, which today is known as the "Spokane Arm" of Lake Roosevelt.

#### INDIAN CLAIMS COMMISSION FILINGS

In 1946, Congress enacted the Indian Claims Commission Act. Act of August 13, 1946 (60 Stat. 1049). Pursuant to that Act, there was a five-year statute of limitations to file claims before the Commission which expired August 13, 1951. It was under the Indian Claims Commission Act that the Colvilles were able to settle their claims in 1994. And it was due to a quirk of circumstances that the Spokanes were not.

In 1951, both the Spokane Tribe and the Colville Tribes filed land claims with the Indian Claims Commission prior to the August 13, 1951 Statute of Limitations deadline. Neither tribe filed claims seeking compensation for the use of their lands for the production of hydropower at Grand Coulee before the deadline. Neither tribe understood, nor were they advised, that there would be a need to even file such claims. After all, beginning in the 1930s and then resuming through the 1970s, the historical and legal record is replete with high level agency correspondence, Solicitor's Opinions, inter-agency proposals/memoranda, Congressional findings and directives and on-going negotiations with the affected Tribes to come to agreements upon the share of revenue generated by Grand Coulee which should go to the Tribes for the use of their respective lands. The Tribes had every reason to believe that its Trustee, the United States, was, although belatedly, going to act in good faith to provide fair and honorable compensation to the Tribes for the United States' proportionate use of our Tribal resources for revenue generated by the Grand Coulee Dam.

The ICC Act imposed a duty on the Bureau of Indian Affairs to apprise the various tribes of the provisions of the Act and the need to file claims before the Commission. While the BIA was well aware of the potential claims of the Spokane Tribe to a portion of the hydropower revenues generated by Grand Coulee, there is no evidence that the BIA ever advised the Tribe of such claims. As the Tribe's long-time attorney explained in 1981:

*"The writer was employed in 1955 as the Tribe's first General Counsel. The tribal leaders of 1951 were still in office. When asked why they had not filed claims for the building of Grand Coulee, the destruction of their fishery and loss of their lands, they were thunderstruck. They had no knowledge at all that they might have filed such claims. They told the writer that no one had alerted them to the possibility of such claims. They did not know that these potential claims might be governed by the*



*Claims Commission Act. They assumed that their rights were still alive, and well they may be. The Superintendent had approached them in about 1949 with the Tripartite agreement between the BIA, Bureau of Reclamation, and the National Parks Service for the establishment of and administration of the Indian Zones pursuant to the Act of 1940. While he got them to sign pre-written resolutions approving this agreement [so] vital to their river and lake rights, not a word was spoken of the possibility of the tribe filing claims. The deadline of August 13, 1951 was therefore allowed to pass without the claims having been filed."*<sup>6</sup>

Thus, the Spokane Tribe in 1967 settled its ICCA claims, while the expectation of fair treatment for Grand Coulee's impacts continued. Ironically, the Spokane Tribe's willingness to resolve its differences with the United States would later be used as justification for the United States' refusal to deal fairly and honorably with the Tribe.

Meanwhile, the Colvilles, who had not settled their ICCA claim, continued that litigation against the United States. In 1975, the Indian Claims Commission ruled for the first time ever that it had jurisdiction over ongoing claims as long as they were part of a continuing wrong which began before the ICCA's enactment and continued thereafter. *Navajo Tribe v. United States*, 36 Ind. Cl. Comm. 433, 434-35 (1975). Over objections by the United States, the Colvilles sought, and in 1976 obtained, permission from the Commission to amend their complaint to include for the first time their Grand Coulee claims. With new life breathed into their claims, the Colvilles pursued litigation of their amended claims to the Federal Circuit Court of Appeals, which held that the ICCA's "fair and honorable dealings" standard may serve to defeat the United States' "navigational servitude" defense.<sup>7</sup> In light of this ruling, the United States negotiated with the Colvilles to resolve that Tribe's Grand Coulee-related claims. Unfortunately, however, because the Spokane Tribe in 1967 had acted in cooperation with the United States to settle its ICCA case, it lacked the legal leverage to force settlement.

In 1967, construction of six new generating units began on the Grand Coulee Dam. That construction prompted a thirteen-year flurry of activity by the United States to address the claims of the tribes to a share of the benefits of the Grand Coulee Project.

#### NEGOTIATIONS WITH BOTH TRIBES CONTINUE

In 1972, the Secretary of the Interior's Task Force began negotiation with the tribes through multiple policy, legal and technical committees to address the tribes' claims. The "Secretaries Task Force" engaged the tribes on a full range of issues, including compensation, riverbed ownership and tribal jurisdiction over the inundated Indian Zones. In 1974 the Solicitor of the Department of the Interior issued an Opinion, which concluded, among other things, that the Spokane and Colville Tribes each retained ownership of the lands underlying the Columbia River and, in the case of the Spokane Tribe,

<sup>6</sup> Memorandum of January 12, 1981 with Final Report, Colville/Spokane Task Force (September 1980).

<sup>7</sup> *Colville Confederated Tribes v. United States*, 964 F.2d 1102 (Fed. Cir. 1992).

the lands underlying the Spokane River. The Solicitor found the United States intent to reserve those riverbeds in the Spokane Tribe clear. The Opinion suggested that the resource interests of the Tribes were being utilized in the production of hydroelectric power at Grand Coulee.

In December 1975, the Congress directed the Secretaries of Interior and the Army to establish a Task Force and to open discussions with the tribes:

*"to determine what, if any, interests the Tribe have in such production of power at Chief Joseph and Grand Coulee Dams, and to explore ways in which the Tribe might benefit from any interest so determined."*<sup>8</sup>

While these high-level negotiations were taking place, construction of the third power plant at Grand Coulee continued. The first generating unit of six came into service in 1974.

In May of 1979, following two years of negotiations among federal agencies and the tribes, the Solicitor for Interior proposed to the Secretary of Interior a legislative settlement of the claims of the Colville Tribe and the Spokane Tribe, stating

*"I firmly believe that a settlement in this range is a realistic and fair way of resolving this controversy. The representatives of the Departments of Energy and Army who participated on the Federal Negotiating Task Force concur. It adequately reflects the relatively weak legal position of the tribes. (If the tribes could get around the Government's defenses they conceivably could establish a case for from 15% to 25% of the power of the Grand Coulee and Chief Joseph dams.) In addition to the threat of legal liability to the federal government, there is the undeniable fact that the Colville and Spokane people have been treated shabbily throughout the 40-year history of this dispute. To this day they have received little benefit from these projects on their lands which totally destroyed their fishery (no fish ladders were included) and inalterably changed their way of life. It has been the non-Indian communities and irrigation districts who have benefited from these projects. Much reservation land remains desert, while across the river irrigated non-Indian lands bloom.*

*I am also hopeful that this is one "pro-Indian" bill that the Washington State congressional delegation will support as a fair resolution of a sorry chapter of our history. The tribes have tried recently to cultivate support for such a settlement proposal among key members of the delegation. My understanding is that the delegation's concerns have focused on the size of a settlement award (tribal demands have referred to hundreds of millions of dollars) and a tribal proposal for allocation of a firm power supply in the 1980's an allocation which might be seen as a threat to domestic users in times of shortage."*<sup>9</sup>

<sup>8</sup> S. Rep. 94-505, Dec. 4, 1975, at 79.

<sup>9</sup> Legislative Proposal on Settlement of the Claims of the Colville and Spokane Tribes, Memorandum of Leo M. Krulitz to Eliot Cutler, May 7, 1979.

We do not know what happened to this Interior Solicitor proposal to settle the claims of both tribes. We do know that the sixth and final unit of the third power plant was completed in 1980. In that same year, the congressional Task Force completed its work. In spite of Congresses' direction, rather than determine the tribal interests involved in Grand Coulee and the benefits they might derive from those interests, for the first time in nearly 50 years of promises and negotiations with both tribes, the Task Force asserted legal arguments which the United States might use to defend against or forestall any tribal claims for a share of the hydropower generated by or the revenues derived from the Grand Coulee Project. The report concluded the United States may not be required by law to provide compensation at the same time that the Project's ability to provide benefits to the United States and the region was taking a quantum leap.

The third powerhouse alone provides enough electricity to meet the combined power demand of the cities of Portland, Oregon and Seattle, Washington. However, its contribution to the Federal Columbia River Power System and the inter-connected electric systems serving the western United States goes far beyond the amount of hydropower that is generated.

With completion of the third powerhouse, the Grand Coulee Project was positioned to play a pivotal role in the creation of downstream hydropower benefits from releases from large Canadian storage reservoirs. Grand Coulee became the critical link between water storage facilities in the upper reaches of the Columbia River Basin and downstream generating assets. Rated at 6,809,000 kilowatts capacity, the power-generating complex at Grand Coulee became the largest electric plant in the United States, third largest in the world. It now produces about 21 billion kilowatt hours annually, four times more electricity than Hoover Dam on the Colorado River, and is the least-cost power source in the region's resource stack.

In addition to power production, Grand Coulee is the key to maintaining operating flexibility and, most important, the reliability of the Federal Columbia River Power System and inter-connected systems.

Without the third power plant in particular, and the Grand Coulee Project in general, the configuration and operation of the Federal Columbia River Power System would be very different. The electric systems serving the Pacific Northwest (and western United States) would be less efficient, have much higher average system costs and be far less reliable.

In a sad twist of historical events, two tribes — each feeling the irreversible pain of Grand Coulee's devastation — found themselves on separate paths. The Colville Tribes were able to continue their legal battles with the United States through settlement in the mid-1990s, while the Spokane Tribe's uniformed willingness to settle in the 1960's cost it substantial legal and political leverage in future dealings with the United States.

The Tribe notes here that this legislation is not a settlement of legal claims. Rather, it is "to provide for equitable compensation. . . for the use of tribal lands for the production of hydropower by the Grand Coulee Dam. . . ." Congress has an established policy of providing subsequent equitable

compensation for tribes impacted by federal hydroelectric projects. In the case of Pick-Sloan, Congress passed five acts between 1992 and 2000 that acknowledged decades-prior federal compensation as inadequate and established trust funds for affected tribes seeded by Pick-Sloan revenues. In determining fund amounts, Congress endeavored to employ the same methodology to ensure that tribes affected by Pick-Sloan received similar compensation. In the case of Pick-Sloan, there was no pending litigation that spurred Congress to act; the relevant statutes of limitation had long since run.

Similar to Pick-Sloan equitable compensation acts, the Colville settlement was also not a settlement of legal claims. The Department of Justice took the express position before Congress that the Colville also had no legal claim; only a "moral claim". The settlement was based on the history and record of dealings with the Tribe. This history and record includes the repeated promises made by the U.S. to provide compensation to both tribes.

*"While plaintiff had no legal and equitable claim based on the navigational servitude, they did have a viable moral claim based on the 'fair and honorable dealings' provision of the Indian Claims Commission Act of 1946.*

*The resolution reached in the proposed settlement does not constitute an admission of liability. . . . But, we are prepared to recognize that the record, in this timely filed claim, can be read to reflect an undertaking by the United States with respect to power values. Because of that we think it is fair and just to fashion a complete resolution of this longstanding claim."*<sup>10</sup>

#### CONTINUING RECOGNITION OF THE TRIBE'S INTERESTS

In 1990, the federal government and the Tribes entered into the Lake Roosevelt Cooperative Management Agreement, which states that "[t]he Spokane Tribe shall manage, plan and regulate all activities, development, and uses that take place within that portion of the Reservation Zone within the Spokane Reservation in accordance with applicable provisions of federal and tribal law, and subject to the statutory authorities of Reclamation . . . to carry out the purposes of the Columbia Basin Project."

Litigation over the ownership of the original Spokane Riverbed resulted in a separate federal court opinion (*Washington Water Power v. F.E.R.C.*, 775 F.2d 305, 312 n. 5 (D.C. Cir. 1985)), a court order (*Spokane Tribe of Indians v. State of Washington, Washington Water Power Company and United States of America*, No. C-82-753-AAM, Judgment and Decree Confirming Disclosure and Quieting Title to Property (U.D. Dist. Ct., E.D. Wash., September 14, 1990)), and a separate settlement agreement (*Spokane Tribe of Indians v. Washington Water Power Company*, No. C-82-

<sup>10</sup> Statement of Peter R. Steensland, Appellate Section Chief, Environment and Natural Resources Div., Dept. of Justice (Joint Hearing on S. 2259 before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994. at 17).

AAM, Judgment (U.S. Dist. Ct. E.D. Wash., March 3, 1995)): all of which provide and affirm that the Spokane Tribe holds full equitable title to the original Spokane Riverbed.

In 1994 Congress passed the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act (P.L. 103-436; 108 Stat. 4577, 103d Congress, November 2, 1994) to provide compensation to the Colville Tribes for the past and future use of reservation land in the generation of electric power at Grand Coulee Dam.

- A. For past use of the Colville Tribes' land, a payment of \$53,000,000.
- B. For continued use of the Colville Tribes' land, annual payments of \$15,250,000, adjusted annually based on revenues from the sale of electric power from the Grand Coulee Dam project and transmission of that power by the Bonneville Power Administration.

In 1994 Congress also directed the Bonneville Power Administration, Department of Interior and the relevant federal agencies, under the "fair and honorable dealings" standard, to enter into negotiation with the Spokane Tribe to address the Tribe's comparable and equitable claims for the construction and operation of Grand Coulee Dam.

During the hearing on the Colville Settlement bill, the Spokane Tribe sought an amendment that would have waived the Indian Claims Commission Act's statute of limitations to enable the Spokane to pursue its Grand Coulee claims through litigation. In the words of then Tribal Chairman Warren Seyler, "We believe it would be unprecedented for Congress to only provide relief to one tribe and not the other when both tribes were similarly impacted." Hearing Record, Colville Tribes Grand Coulee Settlement, H.R. 4757, pp. 56-61 (August 2, 1994).

Colville Tribal leaders and the bill's Congressional sponsors asked the Spokane to withdraw the request for an amendment to waive the statute of limitations. The Spokane complied, with the understanding that good faith negotiations to reach a fair and honorable settlement with the United States would be imminent. As a result, the following statements were made in a colloquy accompanying the Colville Tribes' Grand Coulee Settlement legislation:<sup>11</sup>

Senator Bradley stated:

*"S. 2259 settles the claims of the Confederated Tribes of the Colville Reservation, yet the claims of the Spokane Tribe which are nearly identical in their substance, remain unsettled. The historic fishing sites and the lands of the two tribes were inundated by the Grand Coulee Project. It is clear that hydropower production and water development associated with the Project were made possible by the contributions of both tribes. Thus, I believe it is incumbent that the United States address its obligations under the Federal Power Act to both Tribes."*

<sup>11</sup> Colloquy to Accompany S. 2259, A Bill Providing for the Settlement of the Claims of the Confederated Tribes of the Colville Reservation Concerning Their Contribution to the Production of Hydropower by the Grand Coulee Dam, and for Other Purposes.

Senator Murray stated:

*"The settlement of the claims of the Colville Tribes is long overdue. The claim, first filed by the Colville Tribes over forty years ago, is based upon the authority the Congress vested in the Indian Claims Commission, which provided a five-year period during which Indian tribes could bring their claims against the United States.*

*Unfortunately, the Spokane Tribe did not organize its government in time to participate in the claims process.*

*The fair and honorable dealings standard established in the Indian Claims Commission Act should clearly apply to the United States' conduct and relationship with both the Colville and Spokane Tribes. I would urge, in the strongest possible terms, that the Department of the Interior and other relevant federal agencies enter into negotiations with the Spokane Tribe that might lead to a fair and equitable settlement of the tribe's claims."*

Senator Inouye stated:

*"I fully support the notion that the United States has a moral obligation to address the claims of the Spokane Tribe, and I would be pleased to join you in a letter to Interior Department Secretary Babbitt urging that negotiations be undertaken by the Department."*

Senator Bradley added:

*"Under the Federal Water Power Act, which is now referred to as the Federal Power Act, where an Indian Tribe's land contributes to power production, the licensee must pay an annual fee to the Indian Tribe which represents the tribe's contribution to power production. I too, would be pleased to join Senator Murray and Chairman Inouye in urging the Interior Department and the Bonneville Power Administration to enter into negotiations with the Spokane Tribe to address the tribe's claims."*

Senator McCain stated:

*I also want to join my colleagues in urging the Department of the Interior to seize this opportunity to address the Spokane Tribe's comparable and equitable claims for damages arising out of the inundation of their lands for the construction and operation of Grand Coulee Dam."*

Thus, as the Colville Tribes' claims were being addressed, the United States Congress made clear its intent that the Spokane Tribe be treated fairly and honorably in connection with its claims for Grand Coulee damages through prompt, good faith negotiations with the Administration.

The Spokane Tribe adhered to the spirit of good faith negotiations over the next several years. While the Administration in general continued its refusal to take Congress' direction to negotiate fully a fair and honorable settlement with the Spokane Tribe, the Administration lead shifted from the Department of the Interior to the Bonneville Power Administration.

For the next six years, from 1998 to 2004, the Tribe engaged in very difficult negotiations with BPA. Finally, in 2004, the provisions of a settlement bill were arrived at in which BPA had no objections.

#### LEGISLATIVE HISTORY

Spokane Tribe settlement legislation has been introduced in the 106<sup>th</sup>, 107<sup>th</sup>, 108<sup>th</sup>, 109<sup>th</sup>, 110<sup>th</sup>, 111<sup>th</sup>, 112<sup>th</sup> and this 113<sup>th</sup> Congress. In the 108<sup>th</sup> Congress, hearings on H.R. 1797 were held before the House Resources Subcommittee on Water and Power on October 2, 2003.

Hearings were also held on the Senate bill S. 1438, on October 2, 2003, before the Indian Affairs Committee. The bill was approved by the United States Senate on November 19, 2004. The House of Representatives adjourned late on November 20, 2004 without time to consider the Senate-passed bill.

A Spokane Settlement Bill was introduced in the 109<sup>th</sup> Congress. The House bill, H.R. 1797, was approved by the House of Representatives on July 25, 2005. In the second session of 109<sup>th</sup> Congress, in 2006, subsequent objections to S. 1438 by the State of Washington Department of Fish and Wildlife, as well as the Lincoln County Commissioners, stalled consideration of the settlement in the Senate. The Senate adjourned without vote on the settlement bill.

#### AMENDMENTS AND SUPPORT

The Spokane Tribe thereafter agreed to modify the proposed legislation to address various concerns related to the return to Tribal ownership of lands taken for the Grand Coulee Project.

Spokane Tribal acreage taken by the United States for the construction of Grand Coulee Dam equaled approximately 39 percent of Colville acreage taken for construction of the dam. The Spokane settlement previously was based on 39 percent of the Colville settlement. At the request of members of Congress, the payment provisions for the Spokane settlement bill were reduced to 29 percent of the Colville settlement in exchange for return of the Tribe's lands taken for the Grand Coulee Project.

In 2007, the Spokane Tribe met with the State of Washington Department of Fish and Wildlife and the Washington Office of the Governor to address their concerns with the settlement bill. The Tribe and State entered into an "Agreement In Principle on May 1, 2007" to resolve those concerns.

The Tribe and the Lincoln County Commissioners held meetings to address the concerns of the Commissioners with provisions of the bill affecting the Spokane River. The Tribe agreed to amend the bill to address these concerns. In 2007, Section 9(a)(2) was removed, thereby excluding transfer to the Tribe of the south bank of the Spokane River, which is located outside Reservation boundaries. Section 9(a) confined the land to be restored to the Tribe to "land acquired by the United States. . . that is located within the exterior boundaries of the Spokane Indian Reservation." On June 4, 2007, the Commissioners endorsed by letter, "strong support" for the settlement legislation as amended. *See* Attachment 2.

The Stevens County Commissioners in letters of December 18, 2007, expressed "renewed support" of the Tribe and for the settlement: "Please continue in your efforts to get legislation passed which finally settles this debt owed to the Spokane Tribe." *See* Attachment 3. The Tribe also met with landowners concerned about this provision in the bill. The above amendment regarding Section 9(a)(2) resolved their stated concerns.

The Eastern Washington Council of Governments, pursuant to letters of January 23, 2008, by Chairman Ken Oliver provide: "We urge your strongest support and consideration for this issue." *See* Attachment 4.

The Governor of the State of Washington, Christine Gregoire, by letter dated December 14, 2007, to Senator Cantwell and Congressman Dicks, also voiced strong support for the settlement legislation, stating that it is "clearly appropriate" and "long overdue". *See* Attachment 5. By letter dated June 29, 2009 to President Obama, Governor Gregoire explained that "[t]his legislation [then S. 1388] will correct a longstanding wrong" and "request[ed] the support of your administration in righting this injustice and securing enactment of the legislation." *Id.*

The Mayor of the City of Spokane, Mary Verner, by letter to the Washington Congressional delegation on August 25, 2009, stated "strong support for the Spokane Tribe" settlement legislation, finding that the Tribe had "suffered devastating impacts" while recognizing the Tribe's "generous efforts to address . . . the previously stated concerns of affected State and local governments, Indian tribes and individual landowners as well as federal agencies." *See* Attachment 6.

The Spokane Tribe also reached an agreement with the Colville Tribe dated May 22, 2009, providing for a disclaimer provision in the prior bill (S. 1388) regarding adjoining Reservation boundaries. *See* Attachment 7.

In light of the foregoing support, Section 9 of the prior 2009 bill (S. 1388) provided for the return to Tribal ownership of lands within the Spokane Reservation taken by the United States for the Grand Coulee Project. DOI's Bureau of Reclamation (BOR) thereafter expressed concerns about the extent



of continuing federal liability under that return of ownership provision, citing potential liability for erosion and landslides. After extensive Tribal-BOR discussions, the Tribe agreed to remove language in Section 9 providing for the return of taken Reservation lands to Tribal trust status. In exchange, BOR agreed to a new Section 9(a) of Bill S. 1345 that would have confirmed the delegation to the Spokane Tribe of Secretarial authority as set forth in the 1990 DOI-Tribal Agreement (appended hereto as Attachment 8).

The Spokane Tribe has made numerous and significant concessions over the course of negotiations on the provisions of the Bill. When members of Congress so requested, the Tribe agreed that compensation to the Spokane Tribe could be reduced to 29% of the Colville settlement even though Spokane lands taken for Grand Coulee amounted to about 39% of Colville lands so taken. That significant payment reduction was in exchange for the return to Spokane Tribal trust ownership of taken lands. Thereafter, at BOR's request, the Tribe relinquished its demand that the BOR land within the Spokane Reservation Zone be transferred to the BIA to be placed in trust for the benefit of the Tribe, in exchange for Congressional confirmation of the delegation of authority by the Secretary of the Interior to the Spokane Tribe under the 1990 DOI-Tribal Agreement (Attachment 8). In testimony before this Committee on S. 1345, the Administration expressed concern over the delegation provided for in Section 9(a). In response to that concern, the Tribe has reluctantly agreed to remove any reference to federal delegation of authority over those Reservation lands in the current Bill.

Additionally, the current Bill reflects a substantial reduction in back pay compensation: from over \$100 million to \$53 million. The current Bill also reflects the Tribe's hard work with Bonneville Power Administration to modify the payment provisions to be consistent with the 2004 agreement between the Spokane Tribe and the Bonneville Power Administration regarding such payments and thereby render the payments revenue neutral.

The Tribe has reached agreement with members of Congress, federal agencies, the State and county governments, the Colville Tribe, as well as private individuals, to resolve their concerns or objections to the bill. We again wish to acknowledge Senator Cantwell's strong leadership and the considerable efforts of her staff in bringing the stakeholders together between the 112<sup>th</sup> and 113<sup>th</sup> Congress<sup>1</sup> to resolve any remaining concerns.

#### CONCLUSION

The Tribe has exerted significant efforts to retain its homelands, to receive the benefit of the promises made by the United States to reserve our lands, and to fairly compensate us for the use of our lands for the production of hydropower. Our people have endured enormous past and present impacts to their resources, their way of life and their culture due to operation of the Project. Grand Coulee delivers enormous benefits to the United States and the region. The Colville Tribes, similarly situated directly across the Columbia River, share in the benefits of the Project. Spokane deserves the same fair and honorable treatment Congress has provided to Colville and to the tribes affected by Pick Sloan.

ATTACHMENT 1

July 22, 2013 Letter from Chairman Peone to Senator Maria Cantwell

SPOKANE TRIBE OF INDIANS  
P.O. BOX 100 Wellpinit, WA 99040  
(509) 458-6500 FAX (509) 458-6575



July 22, 2013

The Honorable Maria Cantwell  
311 Hart Senate Office Building  
Washington, D.C. 20510

Re: The Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act  
and the Need for Consistent Application of Congressional Policy Towards Tribes  
Impacted by Federal Hydropower Projects.

Dear Senator Cantwell,

I write to request your assistance in passing "The Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act." As set forth herein, this legislation is consistent with established Congressional policies governing fair compensation for tribes who have lost reservation lands to federal water storage and hydropower generation projects. In the case of the Pick-Sloan Program, Congress passed five acts between 1992 and 2000 that acknowledged decades-prior federal compensation as inadequate and established trust funds for the eight affected tribes seeded by Pick-Sloan revenues. In determining fund amounts, Congress endeavored to employ the same methodology to ensure the effected tribes received similar compensation. Notably, there was no pending litigation spurring Congress to act. Consistent with its treatment of tribes affected by Pick-Sloan, in 1994 Congress determined that initial federal compensation to the Confederated Tribes of the Colville Reservation for land lost to Grand Coulee was inadequate and provided substantial additional compensation, including ongoing annual payments seeded from Grand Coulee hydropower revenues.<sup>1</sup> While Grand Coulee also inundated Spokane reservation lands, Congress has yet to provide compensation to Spokane beyond the meager \$4,700 initial compensation provided in 1940. This result cannot be squared with the sound Congressional policy that produced legislation to fairly compensate Colville and the eight tribes affected by Pick-Sloan.

THE PICK-SLOAN EQUITABLE COMPENSATION ACTS

Under the Flood Control Act of 1944 (33 U.S.C. 701 et seq.), Congress authorized construction of five massive dam projects on the Missouri River as part of the Pick-Sloan Program, the primary purpose of which was to provide flood control downstream, as well as improved navigation, hydro-power generation, improved water supplies, and enhanced recreation. The U.S. Army Corps of Engineers, which constructed and operates the dams,

<sup>1</sup> Pub. L. 103-436, 108 Stat. 4577 (Nov. 2, 1994).

estimated in 2000 that the projects' overall annual contribution to the national economy averages \$1.9 billion. However, for several tribes along the Missouri, the human and economic costs of the projects have far outweighed any benefits received, since the lands affected by Pick-Sloan were, by and large, Indian lands, and entire tribal communities and their economies were destroyed.

Affected tribes received initial settlements from Congress that included payment for direct property damages, severance damages (including the cost of relocation and reestablishment of affected tribal members) and rehabilitation for the entire reservation. In providing funds for rehabilitation, Congress recognized that the tribes as a whole, and not just the tribal members within the taking areas, were affected negatively by the loss of the bottomland environment and reservation infrastructure. Accordingly, the settlements provided compensation for severance damages and rehabilitation that averaged four and a half times more than was paid for direct damages.<sup>1</sup>

In 1952, the U.S. District Court awarded the Yankton Sioux \$12,120 or about \$42 an acre, for the appraised value of inundated lands in condemnation proceeding in which neither the Tribe nor its affected members were represented by private counsel. In 1954, the Congress appropriated \$106,500 for severance damages for Yankton Sioux tribal members. In January 1958, the U.S. District Court awarded the Santee Sioux \$52,000, or \$87.67 an acre, for the appraised value of inundated lands pursuant to a 1955 agreement between the Tribe and the Corps of Engineers.

In 1984, a joint Federal-Tribal advisory committee concluded that the compensation the U.S. provided to tribes impacted by Pick-Sloan greatly undervalued their losses. Between 1992 and 2000 Congress enacted legislation to provide more just compensation. First, Congress enacted the Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act, P.L. 102-575, 106 Stat. 4731 (Oct. 30, 1992), which established a trust fund of \$149,200,000 for the Three Affiliated Tribes of the Fort Berthold Reservation related to the loss of 176,000 acres to the Garrison Dam project, and a trust fund of \$90,600,000 for the Standing Rock Sioux Tribe related to the loss of 56,000 acres to the Oahe Dam Project. The trust funds were seeded with receipts of deposits from the Pick-Sloan program. Compensation amounts were based on Federal-Tribal advisory committee recommendations.

Second, Congress enacted the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996, P.L. 104-223, 110 Stat. 3026 (Oct. 1, 1996), which established a \$27.5 million Recovery Fund related to the loss of 15,693 acres to the Fort Randall Dam Project, funded with receipts of deposits from the Pick-Sloan program. As with the Three Affiliated and Standing Rock Sioux tribes, Congress found that the initial compensation payments and mitigation funds that were expended on their behalf were significantly less than the value of the actual damages suffered by the tribes.

<sup>1</sup> See, e.g. Fort Berthold Garrison Act, Pub. L. No. 81-437, 63 Stat. 1026 (1949); Cheyenne River Oahe Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954); Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958); Fort Randall (Crow Creek) Act, Pub. L. No. 85-916, 72 Stat. 1766 (1958); Big Bend (Lower Brule) Act, Pub. L. No. 87-734, 76 Stat. 698 (1962); and Big Bend (Crow Creek) Act, Pub. L. No. 87-735, 76 Stat. 704 (1962).

Third, Congress enacted the Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act, P.L. 105-132, 111 Stat. 2563 (Dec. 2, 1997), which established a \$39.9 million Recovery Fund related to the loss of 22,296 acres of land to the Big Bend Dam Project. Again, the fund was seeded with receipts of deposits from Pick-Sloan.

Fourth, Congress enacted the Cheyenne River Sioux Tribe Equitable Compensation Act, P.L. 106-511, 114 Stat. 2365 (Nov. 13, 2000), which established a \$290,723,000 trust fund (the Cheyenne River Sioux Tribal Recovery Trust Fund) to compensate for the loss of 104,492 acres to the Oahe Dam Project. Again, the fund was seeded with receipts of deposits from Pick-Sloan.

Finally, Congress enacted the Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, P.L. 107-331, 116 Stat. 2839 (2002). The Act established the Yankton Sioux Tribe Development Trust Fund in the amount of \$23,023,743 for the loss of 2,851.40 acres. The Act also established the Santee Sioux Tribe Development Trust Fund in the amount of \$4,789,010 for the loss of 593.1 acres. Congress determined that the Federal Government did not give the Yankton Sioux Tribe and the Santee Sioux Tribe an opportunity to receive compensation for direct damages from the Pick-Sloan program consistent with the opportunities provided to other impacted tribes. Congress acknowledged that the Yankton and Santee were previously compensated pursuant to condemnation proceeding judgments, but determined that the tribes did not receive "just compensation for the taking of productive agricultural Indian lands" through those proceedings. Again, the trust funds were seeded with receipts of deposits from Pick-Sloan.

A review of the Pick-Sloan Equitable Compensation Acts reveals that Congress consistently applied important policies. First, Congress determined that original federal compensation, provided decades earlier, was substantially inadequate. Second, litigation between the tribes and the United States did not drive the legislation: at the time of enactment, relevant statutes of limitations would likely have barred any claims arising from the initial inundation, which occurred decades earlier. Instead, Congress took care to characterize the legislation as providing "equitable" compensation. Third, Congress determined that the economic and social development and cultural preservation of the impacted tribes would be enhanced by participation in Pick-Sloan hydropower generation and water storage fees. Consequently, Congress established funds for each tribe seeded by receipts from Pick-Sloan revenues. Annually, the DOI Secretary withdraws interests from the fund to distribute pursuant to a plan submitted by each tribe that allocates the funds to: 1) economic development; 2) infrastructure development; or the educational, health, recreational and social welfare objectives of the Tribe and its members. Finally, Congress strove for consistency by employing the methodology recommended by the Advisory Committee when determining the trust fund amounts, to ensure that similarly impacted tribes were similarly compensated.

#### GRAND COULEE

As with Pick-Sloan, Grand Coulee brought enormous benefits to the Northwest and the United States, including: hydropower; off-system power sales revenues; flood control; irrigation; transportation; and water supply for endangered and protected species. As with Pick-Sloan, resident tribes were severely impacted. The Confederated Tribes of the Colville Reservation lost

approximately 7,500 acres to inundation, while the Spokane Tribe lost approximately 3,000 acres. As with tribal lands inundated by Pick Sloan, these were valuable "low lying" lands used primarily for agriculture.

When the Grand Coulee project was federalized in 1933, federal officials contemplated that "a reasonable annual rental" would be provided to Colville and Spokane "for the Indians' land and water rights involved."<sup>2</sup> The project received express Congressional authorization under the Rivers and Harbors Act of 1935 (49 Stat. 1028, 1039). In spite of the fact that the Act authorized the project for the purpose, among others, of "reclamation of public lands and Indian reservations ..." no hydroelectric or reclamation benefits flowed to the tribes. Over the next several years the Federal Government moved ahead with the construction of the Grand Coulee Dam, "but somehow the promise that the [Spokane] Tribe would share in the benefits produced by it was not fulfilled."<sup>3</sup>

In the Act of June 29, 1940 (16 U.S.C. 835d et seq.), Congress granted to the United States "in aid of the construction, operation, and maintenance of the Columbia Basin Project, all the right, title, and interest of the Spokane Tribe and Colville Tribes in and to the tribal and allotted land within the Spokane and Colville Reservations, as designated by the Secretary of Interior from time to time." Pursuant to the Act, the Secretary paid \$4,700 to the Spokane Tribe and \$63,000 to the Colville Confederated Tribes. The tribes received no further benefits or compensation: nothing was provided for relocation of tribal members living on the condemned lands; and tribal lands on the bed of the original Columbia River were not condemned at all.

Grand Coulee Dam destroyed all but one salmon run for Colville, while the Spokane salmon fishery was lost entirely. As explained in 1980 by a Senate-directed task force:

Worst of all, Grand Coulee Dam destroyed the salmon fishery from which the Tribes had sustained themselves for centuries. The salmon run played a central role in the social, religious and cultural lives of the Tribes. The great majority of the population of the Tribes lived near the Columbia and its tributaries, and many were driven from their homes when the area was flooded. While Interior Department officials were aware that the fishery would be destroyed, the technology of the time did not permit construction of a fish ladder of sufficient height to allow the salmon to bypass towering Grand Coulee Dam.<sup>4</sup>

In 1994, Congress enacted the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, Pub. L. 103-436, 108 Stat. 4577 (Nov. 2, 1994). Congress determined that the Act and the settlement agreement which it approved "will provide mutually agreeable compensation for the past use of reservation land in connection with the generation of electric power and Grand Coulee Dam, and will establish a method to ensure that the Tribe will be

<sup>2</sup> December 5, 1933 letter from BOR Assistant Commissioner William Zimmerman to BOR Commissioner Dr. Elwood Mead.

<sup>3</sup> Testimony of Assistant Secretary for Indian Affairs in support of the 1994 Colville Settlement legislation, approved in P.L. 103-436, 108 Stat. 4577 (Nov. 2, 1994).

<sup>4</sup> Final Report, Colville/Spokane Task Force, Directed by the Senate Committee on Appropriations, S. Rep. 94-505 (September, 1980).

compensated for the future use of reservation land in the generation of electric power at Grand Coulee Dam ...". The Act provides a one-time payment of \$53,000,000 as back pay and an initial annual payment of approximately \$15,000,000 with ongoing annual payments adjusted for power generation and price. As with the Pick-Sloan legislation, the Grand Coulee Settlement Act reflects Congress' determination that the decades old, initial, federal compensation to Colville was substantially inadequate.

#### CONCLUSION

Spokane has failed to secure legislation comparable to the Colville Reservation Grand Coulee Dam Settlement Act. Some argue that this disparity is warranted because the Colville legislation settled Colville's pending litigation against the United States, whereas Spokane has lost its ability to bring similar claims. The argument is that, unlike Colville, Spokane does not have a *legal* claim to settle. However, compensation to Colville and Spokane for tribal lands lost to Grand Coulee should be placed within the broader context of Pick-Sloan, in which pending litigation against the United States was not a precondition for Congress to provide fair compensation to affected tribes. We appreciate your assistance in passing the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act, which will maintain consistency with the policies that guided Congress' treatment of tribes affected by Pick-Sloan by compensating Spokane based on the methodology employed in the Colville Act without regard to the lack of litigation between the Tribe and the United States.

Respectfully,



Rudy J. Poone  
Chairman  
Spokane Tribal Business Council

#### ATTACHMENT 1A

A spreadsheet showing legislation providing equitable compensation for the Colville Tribes and the Pick Sloan Tribes for flooding to reservation lands from Federal Hydro Projects.

TRIBE	DAMS	ACERAGE LOST	TOTAL COMPENSATION
Colville Confederated Tribes	Grand Coulee	21,000	\$53,000,000 in back payment. Annual payments thereafter based on percentage hydro production.
Standing Rock Sioux ND& SD	Garrison	152,360	\$161,805,625
Crow Creek Sioux, SD	Oahe	55,994	\$102,946,553
Lower Brule Sioux, SD	Fort Randall Big Bend	15,597	\$33,437,614
Cheyenne River Sioux, SD	Fort Randall Big Bend	22,296	\$43,645,988
Yankton Sioux, SD	Oahe	104,420	\$301,366,972
Santee Sioux, NE	Fort Randall	2,851	\$23,251,253
	Gavins Point	593	\$4,841,010

ATTACHMENT 2

June 4, 2007 Letter from Lincoln County Commissioners to Chairman,  
Spokane Tribe of Indians

BOARD OF  
Lincoln  
County  
Commissioners

Lincoln County, Washington  
P.O. Box 28 • Davenport, Washington 99122  
Office Phone: (509) 725-3931 • FAX: (509) 725-3024

Regular Meetings First & Third Monday of Each Month

Richard L. Sherwood, Chairman  
Spokane Tribe of Indians  
P.O. Box 100  
Wellpinit, WA 99040

June 4, 2007

RE: Settlement Bill

Dear Chairman Sherwood,

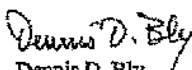
Thank you for providing Lincoln County an advance copy of the proposed federal legislation for the Spokane Tribe of Indians. As you are aware, last year we took exception to the proposed legislation because it included a provision which would transfer the south shore of the Spokane River, up to the 1290 elevation, to the tribe. We greatly appreciate that in the current legislation you have eliminated that provision and that the South shore of the Spokane River will remain as it has since the inception of the Coulee Dam Project.

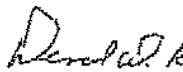
The Board of Commissioners has a very minor concern with the agreement that was entered into with the Washington State Department of Fish and Wildlife. However, the concern is of such a minor nature that we would not wish to hold up your settlement bill over an issue that we feel certain can be worked out between ourselves.

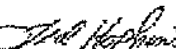
Based on our understanding that the legislation proposed by the Spokane Tribe of Indians would officially transfer administrative jurisdiction of that portion of land that includes the south bank of the Spokane River as it existed before Grand Coulee Dam was constructed; and understanding that the exact location of the original south bank cannot be accurately determined; but further understanding that it does not reach to the south bank of the current body of water, the Board of Lincoln County Commissioners fully and strongly supports the legislation being proposed to settle the tribe's long standing claim against the federal government. Our support is based on the proposed legislation that has been provided by the tribe and if that legislation changes during the legislative process, we would reserve the right to re-evaluate the impact on our citizens and our support for the bill.

We want to thank the Council of the Spokane Tribe of Indians for their efforts to reach out to Lincoln County in a positive manner to resolve an issue that was potentially divisive to the region.

Respectfully,

  
Dennis D. Bly  
Chairman

  
Derald D. Boleneus  
District #2

  
Ted Hopkins  
District #3

ATTACHMENT 3

December 18, 2007 Letters from Stevens County Commissioners to  
Senators Cantwell and Murray



Tony Delgado  
District No. 1

Merrill J. Ott  
District No. 2

Malcolm Friedman  
District No. 3

**Stevens County Commissioners**

215 South Oak St., Room #214, Colville, WA 99114-2861  
Phone: 509-684-3751 Fax: 509-684-8310 TTY: 800-833-6388  
Email: Commissioners@co.stevens.wa.us

Polly Coleman  
Clerk of the Board

Nettie Windsor  
Assistant Clerk

Senator Maria Cantwell  
U.S. Senate Rm 717  
Hart Building  
Washington, D.C., 20510

December 18, 2007

Dear Senator Cantwell,

We are writing to request renewed support for authorizing reparation payments to the Spokane Tribe of Indians. The Grand Coulee Dam's reservoir, Lake Roosevelt inundated their traditional lands many decades ago, and through a series of false starts and circumstances, the Spokane Tribe has yet to receive reparation payments.

Ironically, the Eastern Washington Council of Governments, of which Stevens County is a member, met recently. It was on December 7 – the 66<sup>th</sup> anniversary of Pearl Harbor – and it was then, in 1941, in Washington, D.C. that a bill was being considered to grant the reparation payments to the tribe. In a most gracious and patriotic fashion, the Spokane Tribe did not pursue the passage of the bill granting reparations, but instead, stood aside to stand side by side with all the Americans to engage in the WWII conflict.

They continue to lead by example, and we are honored to call them our neighbors and friends. Please continue in your efforts to get legislation passed which finally settles this debt owed to the Spokane Tribe.

Sincerely,

Malcolm Friedman  
Chairman of the Board  
Commissioner

Merrill J. Ott  
Commissioner

Tony Delgado  
Commissioner



Tony Delgado  
District No. 1

Merrill J. Ott  
District No. 2

Malcolm Friedman  
District No. 3



**Stevens County Commissioners**

215 South Oak St, Room #214, Colville, WA 99114-2561  
Phone: 509-684-3751 Fax: 509-684-8310 TTY: 800-633-6388  
Email: Commissioners@co.stevens.wa.us

Polly Coleman  
Clerk of the Board

Natcia Winters  
Assistant Clerk

Senator Patty Murray  
E-34 Dirksen Senate Building  
Washington, D.C. 20510

December 18, 2007

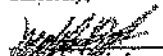
Dear Senator Murray,

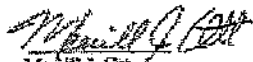
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They continue to lead by example, and we are honored to call them our neighbors and friends. Please continue in your efforts to get legislation passed which finally settles this debt owed to the Spokane Tribe.

Sincerely,

  
Malcolm Friedman  
Chairman of the Board  
Commissioner

  
Merrill J. Ott  
Commissioner

  
Tony Delgado  
Commissioner

ATTACHMENT 4

January 23, 2008 Letters from Eastern Washington Council of  
Governments to Senators Murray and Cantwell and Representative  
McMorris-Rodgers

Eastern Washington  
Council of Governments

215 S. Oak St, Colville, WA 99114  
509-684-3751

---

Chairman Ken Oliver, Pend Oreille County  
Vice Chairman Rudy Plager, Adams County  
Secretary Merrill Ott, Stevens County  
Treasurer Ted Hopkins, Lincoln County

Representative Cathy McMorris-Rodgers  
1708 Longworth House Office Building  
Washington, D.C., 20515

Jan 23, 2008

Dear Representative McMorris-Rodgers,

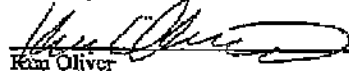
The Eastern Washington Council of Governments (EWCOG) continues to fully support efforts by the Spokane Tribe of Indians to gain reparation payments for the Columbia River's inundation of their lands when the Grand Coulee Dam was constructed many decades ago. To this date, the United States has yet to fulfill their promise of reparation payments, and though legislation was introduced last year, the authorization has yet to materialize.

The county commissioners of the EWCOG continue to meet on various issues of concern here in the northeast portion of this great state. Our concerns for developing a healthy economy, protecting our resources, and engaging our state and federal representatives remain strong. Your visits to our region have been encouraging to us all.

We urge your strongest support and consideration for this issue. As we move ahead in our regional issues, our friends and neighbors in the Spokane Tribe have and continue to be an integral force helping us all.

Thank you for your service to our great state of Washington.

Sincerely,

  
Ken Oliver

Pend Oreille County Commissioners  
Chairman, Eastern Washington Council of Governments  
[commissioners@pendoreille.org](mailto:commissioners@pendoreille.org)  
[commissioners@co.stevens.wa.us](mailto:commissioners@co.stevens.wa.us)

Eastern Washington  
Council of Governments

215 S. Oak St, Colville, WA 99114  
509-684-3751

---

Chairman Ken Oliver, Pend Oreille County  
Vice Chairman Rudy Plager, Adams County  
Secretary Merrill Ott, Stevens County  
Treasurer Ted Hopkins, Lincoln County

Senator Maria Cantwell,  
511 Dirksen Senate Office Building  
Washington, D.C., 20510

Jan 23, 2008

Dear Senator Cantwell,

The Eastern Washington Council of Governments (EWCOG) continues to fully support efforts by the Spokane Tribe of Indians to gain reparation payments for the Columbia River's inundation of their lands when the Grand Coulee Dam was constructed many decades ago. To this date, the United States has yet to fulfill their promise of reparation payments, and though legislation was introduced last year, the authorization has yet to materialize.

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Thank you for your service to our great state of Washington.

Sincerely,



Ken Oliver  
Pend Oreille County Commissioners  
Chairman, Eastern Washington Council of Governments  
[commissioners@pendoreille.org](mailto:commissioners@pendoreille.org)  
[commissioners@co.stevens.wa.us](mailto:commissioners@co.stevens.wa.us)

Eastern Washington  
Council of Governments

215 S. Oak St, Colville, WA 99114  
509-684-5751

Chairman Ken Oliver, Pend Oreille County  
Vice Chairman Rudy Plager, Adams County  
Secretary Merrill Ott, Stevens County  
Treasurer Ted Hopkins, Lincoln County

Senator Patty Murray  
173 Russell Senate Office Building  
Washington, D.C., 20510

Jan 23, 2008

Dear Senator Murray,

The Eastern Washington Council of Governments (EWCOG) continues to fully support efforts by the Spokane Tribe of Indians to gain reparation payments for the Columbia River's inundation of their lands when the Grand Coulee Dam was constructed many decades ago. To this date, the United States has yet to fulfill their promise of reparation payments, and though legislation was introduced last year, the authorization has yet to materialize.

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We urge your strongest support and consideration for this issue. As we move ahead in our regional issues, our friends and neighbors in the Spokane Tribe have and continue to be an integral force helping us all.

Thank you for your service to our great state of Washington.

Sincerely,



Ken Oliver  
Pend Oreille County Commissioners  
Chairman, Eastern Washington Council of Governments  
[commissioners@pendoreille.org](mailto:commissioners@pendoreille.org)  
[commissioners@co.stevens.wa.us](mailto:commissioners@co.stevens.wa.us)

**ATTACHMENT 5**

**December 14, 2007 Letter from Governor Christine O. Gregoire to Senator Cantwell and Congressman Dicks and June 29, 2009 Letter from Governor Gregoire to President Obama**



CHRISTINE O. GREGOIRE  
Governor

STATE OF WASHINGTON

December 14, 2007

OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • [www.governor.wa.gov](http://www.governor.wa.gov)

The Honorable Maria Cantwell  
United States Senate  
511 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Norm Dicks  
U.S. House of Representatives  
2467 Rayburn House Office Bldg.  
Washington, D.C. 20515

Dear Senator Cantwell and Congressman Dicks:

Today I write in support of the Spokane Tribe of Indians Grand Coulee Dam Equitable Compensation Settlement Act, a bill to provide monetary compensation and return of the lands to the people of the Spokane Tribe that were taken, damaged, or used for the construction and operation of the Grand Coulee Dam. I also offer the full assistance of my office in your efforts to pass this legislation as it is clearly appropriate that this settlement be approved and compensation paid.

For many years, the people of the Spokane Tribe were joined with the Columbia and Spokane Rivers in a relationship that defined the Tribe's culture, economy, and way of life. The rivers were their primary source of food, trade and spirituality, and played a central role in shaping tribal identity. To be a Spokane tribal member was to believe in and rely upon the abundance and permanence of the river's bounty. The Spokane People referred to the Spokane River as the "Path of Life." It is difficult for most people living in Washington to comprehend the profound and devastating impacts and effects forced upon tribal members during construction and subsequent operation of the dam.

As a result of your efforts in Congress, the people of the United States now have an opportunity to redress, in part, the damage inflicted on the Tribe. I am committed to work with you to secure some measure of fair and equitable compensation for the past and continued use of Spokane Tribal land for the production of hydropower at Grand Coulee Dam.

The state of Washington, the Pacific Northwest, and the United States receive enormous benefits from the low-cost power, flood protection, water supply, and other value provided by the Grand Coulee Dam. Indeed, the very competitiveness of the regional economy is founded in large measure upon these benefits. The Spokane Tribe has long waited to receive fair and honorable compensation for the use of their lands by Grand Coulee. It should be obvious to all that fulfillment of that obligation is long overdue.

I look forward to working with you to enact this important legislation.

Sincerely,

Christine O. Gregoire  
Governor

CHRISTINE O. GREGOIRE  
Governor



STATE OF WASHINGTON

OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6700 • [www.governor.wa.gov](http://www.governor.wa.gov)

The Honorable Barack Obama  
President of the United States  
The White House  
1600 Pennsylvania Avenue  
Washington, DC 20500

June 29, 2009

RE: Spokane Tribe of Indians' Grand Coulee Dam Equitable Compensation Settlement Act

Dear Mr. President:


I write to you on behalf of the Spokane Tribe of Indians to request your support for the Tribes' Grand Coulee Settlement legislation soon to be introduced in Congress. This legislation will help correct a longstanding wrong against this Washington State tribe. The legislation is expected to be introduced soon, and will be sponsored in the Senate by Senators Patty Murray and Maria Cantwell of Washington and by Senator Inouye. In the House of Representatives the bill will be sponsored by Congressman Jay Inslee and others.

The Spokane Indian Reservation is located at the confluence of the Columbia and Spokane Rivers in the eastern part of the state of Washington. The construction of the Grand Coulee Dam in the 1930's created a reservoir which had significant adverse affects on the Tribe. It cut off critical salmon runs, inundated boundary rivers and flooded thousands of acres of the Reservation. The Tribe received one payment of \$4,700 for this damage.

Since that time the Tribe has been trying to secure a settlement with the United States. Negotiations with the Departments of Interior and Justice failed and legislation has been introduced in Congress over the past several years, passing one house or the other but never both. Most recently the Tribe has worked to resolve concerns about the legislation raised by state and local governments. The annual settlement payments under the bill would be paid to the Tribe from the Bonneville Power Administration and derived from agency cost savings rather than ratepayers. The bill does not require any direct federal spending.

I respectfully request the support of your administration in righting this injustice and securing enactment of the legislation to provide for equitable compensation to the Spokane Tribe of Indians of the Spokane Reservation for the use of tribal land for the production of hydro power by the Grand Coulee Dam. Thank you for your consideration.

Sincerely,

  
Christine O. Gregoire  
Governor

ATTACHMENT 6

August 25, 2009 Letter from Mary B. Verner, Mayor of Spokane to  
Senators Cantwell and Murray and Representatives Dicks and Inslee



City of Spokane

The Honorable Maria Cantwell  
United States Senate  
SD-511 Dirksen Senate Office Building  
Washington, DC 20510-4705

August 25, 2009

Dear Senator Cantwell:

I write to voice strong support for the Spokane Tribe of Indians' Grand Coulee Dam Equitable Compensation Settlement Act – S. 1388 and H.R. 3097. The legislation has the endorsement of Governor Gregoire, all of the neighboring County Commissioners and the National Congress of American Indians. I am familiar with the relevant history of the Tribe and the proposed legislation and I endorse this bill and this long overdue settlement.

The Grand Coulee Dam has brought tremendous benefits to our region, to the West, indeed to the entire country. Regrettably, those rewards come at the expense of the Spokane Tribe and the Colville Confederated Tribes. Both Tribes have suffered devastating impacts to their culture, economy and way of life. Yet the Colvilles secured a settlement with the United States in 1994, while the annual impacts to the Spokane continue unmitigated, and their historic claims are still unresolved. When the Colville bill was considered in 1994, the Spokanes were promised a similar settlement by Congress. The Spokane legislation is based on the 1994 Colville settlement. The proposed legislation represents a final settlement of the Spokane Tribe's claims.

Similar Spokane settlement bills were approved by the United States Senate during the 108<sup>th</sup> Congress in 2004 and the House of Representatives in the 109<sup>th</sup> Congress in 2005. I applaud the Tribe in their successful and generous efforts to address in this bill the previously stated concerns of affected State and local governments, Indian Tribes and individual landowners as well as federal agencies. I also note that the annual compensation payments provided for in the bill are not to be recovered from the region's ratepayers, but from cost reductions in expenditures by Bonneville Power Administration.

The Spokane Tribe is our good neighbor. The Tribe has fought long and hard in numerous regional forums to protect and enhance the values and interests associated with the Spokane River and Columbia River as well as Lake Roosevelt. Congressional approval of this proposed settlement legislation will right a longstanding wrong imposed on the Spokane Tribe, foster positive intergovernmental relations, as well as provide numerous other benefits both to the Tribe and our region.

A fair and honorable settlement with the Spokane Tribe, for the past and continued use of their lands for the production of hydropower, is long overdue. I urge Congress to enact this important legislation.

Sincerely,

*Mary*

Mary B. Verner  
Mayor

ATTACHMENT 7

May 22, 2009 Letter from Chairman, Spokane Tribe of Indians and  
Confederated Tribes of the Colville Reservation, to Congressman Inslee  
and Senator Cantwell with proposed changes to Section 8 of S.  
1388 (1 page) and proposed report language



**OFFICE OF THE RESERVATION ATTORNEY**

Confederated Tribes of the Colville Reservation

P. O. Box 150

Nespelem, WA 99155

Telephone: (509) 634-2381

Fax: (509) 634-2387

Via Teleceptor to 208-667-4695,  
Followed by First-Class U.S. Mail

June 17, 2007

Howard Funtke, Attorney At Law  
Howard Funtke & Associates, P.C.  
424 Sherman Ave., Suite 308  
P.O. Box 969  
Coeur d'Alene, ID 83816-0969

Re: Disclaimer language for Colville-Spokane Reservation boundary in  
Spokane Tribe Coulee Dam Settlement Bill

Dear Mr. Funtke:

In a letter dated March 21, 2007, I proposed draft disclaimer language for Section 9 of the Spokane Tribe Grand Coulee Dam Settlement bill, re the boundary between the Colville and Spokane Reservations. We subsequently discussed this and on April 25, 2007, at a meeting in Spokane, you provided me with modifications to my proposed language. This letter is to advise that your modifications are acceptable to the Colville Tribes. The language in question, including your modifications, is as follows:

Nothing in this section shall be construed as establishing or affecting the precise location of the boundary between the Spokane Indian Reservation and the Colville Reservation along the Columbia River.

This language is found at Section 9 (e) of the full draft bill as you provided it to me an email on May 10, 2007. You have indicated that the bill may be introduced soon. Please advise me in the event Section 9 is modified in any way. Please note, too, that the Colville Tribes' acceptance of this boundary disclaimer language is not intended to indicate any position on the merits of the bill or whether it should be enacted.

I have appreciated your courtesy and professionalism in working with me to produce language that is acceptable to both the Spokane and Colville Tribes. Please do not hesitate to contact me if you have any further questions or concerns.

Sincerely,

  
Stephen H. Slaughter  
Reservation Attorney



**SEC. 8. TRANSFER OF ADMINISTRATIVE JURISDICTION AND RESTORATION OF OWNERSHIP OF LAND.**

(a) Transfer of Jurisdiction - The Secretary shall transfer administrative jurisdiction from the Bureau of Reclamation to the Bureau of Indian Affairs over all land acquired by the United States under the Act of June 29, 1940 (16 U.S.C. 835d), that is located within the exterior boundaries of the Spokane Indian Reservation established pursuant to the Executive Order of January 18, 1881. Such transfer shall be subject to the provisions of subsection c.

(b) Restoration of Ownership in Trust -

(1) IN GENERAL - All land transferred under this section -

(A) shall be held in trust for the benefit and use of the Spokane Tribe; and

(B) shall remain part of the Spokane Indian Reservation.

(2) FEDERAL TRUST RESPONSIBILITY- The Federal trust responsibility for all land transferred under this section shall be the same as the responsibility for other tribal land held in trust within the Spokane Indian Reservation.

(c) Colville-Spokane Reservation Boundary - Nothing in this section establishes or affects the precise location of the boundary between the Spokane Indian Reservation and the Colville Reservation along the Columbia River or the agreement between the Colville and Spokane Tribes that the common boundary of the Spokane and Colville Indian zones established under the Act of June 29, 1940 (16 U.S.C. 835d) shall follow the center line of Lake Roosevelt without reference to the course of the submerged Columbia River. Further, nothing in this section affects either Tribe's rights to the use of that Tribe's respective portion of the Indian zone as provided by the Act of June 29, 1940 (16 U.S.C. 835d).

**Proposed Report Language**

Section 8(c) provides that nothing in this section establishes or affects the precise location of the actual boundary between the Spokane Indian Reservation and the Colville Reservation along the Columbia River, the respective use rights of each Tribe in Lake Roosevelt as reserved by the 1940 Act, or the common boundary of the Indian zones established pursuant to the 1940 Act in a Joint Resolution adopted by the two Tribes on September 17, 1973. That agreement provides:

1. That the common boundary of the enlarged Indian zones between the Spokane and Colville Reservations follow the center line of Roosevelt Lake without reference to the course of the submerged Columbia River so that the Spokane Indian zone will be to the east of said center line and the Colville Indian zone to the west.
2. That the Tribes establish a policy of reciprocity within both Indian zones where they are adjacent to each other with the cross deputization of game wardens, patrols, and other officers and uniformity in the administration of tribal rights and jurisdiction in that area.
3. That there be reserved for later negotiations and accord the question of where the actual common boundary between the two reservations exists on the bottom of the Roosevelt Lake, that is, whether it is at the center line or the west bank of the submerged Columbia River.

Nothing in this section affects these rights and agreement inter se. The Committee recognizes that the actual boundary between the two Reservations on the Columbia River and Lake Roosevelt is a matter to be resolved by further negotiation and accord between the Spokane and Colville Tribes. Accordingly, the Committee recommends that any unresolved issues regarding the common Reservation boundary should be a matter to be resolved through further negotiations between the two Tribes and are not affected in any way by the proposed legislation.

**Attachment 8**—the 1990 Lake Roosevelt Cooperative Management Agreement has been retained in Committee files and can be found at <http://www.nps.gov/history/history/online-books/laro/adhi/adhia.htm>.

Mrs. WYNCOOP. First, I didn't know that they wouldn't back up the water. I wasn't there when all that happened. I was going to school in Chamala, Oregon, near Salem, an all-Indian school, when all that happened, I didn't know anything about it. When I got home, all my mom and dad got was \$1,300. Besides, they built a new home for them, which was right above where we lived.

But they lost everything. We had a big farm. We had horses and cows and a big garden. We lost our orchard. They had nothing when they moved up to the new house that they were supposed to build, I don't know whether they used the money to build that house. But they had a house to live in, but they didn't have anything. My mom tried to plant a garden, but that didn't work.

They had a hard life after that. When I got home and all that happened, that my mom tried to make a garden for themselves.

But that wasn't working. My mom and dad had nothing. They lost everything.

The CHAIRWOMAN. Mrs. Wynecoop, thank you so much for being here today and for your testimony. Oftentimes, these water settlement issues are before this Committee in legal terms, in lawyerese, and all of the technical issues. And to have a human face put on what these settlement issues are all about is very moving. So thank you for traveling here and sharing that with the Committee.

Next we will turn to the Honorable Mark Macarro, Chairman of the Pechanga Band, to give his testimony.

**STATEMENT OF HON. MARK MACARRO, CHAIRMAN,  
PECHANGA BAND OF LUISEÑO INDIANS**

Mr. MACARRO. [Greeting in native language.] Good afternoon, Chairwoman Cantwell. It is good to be here, it is an honor to be here. My name is Mark Macarro, and I am the Tribal Chairman of the Pechanga Band of Luiseño Indians in Temecula, California. I represent the Pechanga people. I am their voice.

I am honored to be here to discuss the Pechanga Water Settlement Act of 2013. I have been intimately involved with Pechanga's struggles over our water rights for the past three decades. I know firsthand what this settlement means to the Pechanga people. I want to give a special thank you to Senator Boxer and Senator Feinstein for their strong support of Pechanga and our efforts to introduce and move our water settlement bill during the last Congress, and also to their continued efforts during this Congress. Frankly, we would not be here today without their staunch support and commitment to the Band's efforts to settle our water claims.

Thank you as well to our negotiating partners, Rancho California Water District, Eastern Municipal Water District and Metropolitan Water District. We have been working with them for a number of years now to resolve our claims through negotiation rather than litigation.

Then last but not least, thank you to the Administration for their active participation throughout the settlement process. In particular, the Secretary's Office of Indian Water Rights and the counselor to the Deputy Secretary have been instrumental in moving forward our efforts to fairly and equitably settle our claims for water rights and obtain the long-term water supplies we need to guarantee water for the future generations of our people.

We have continued to meet with the Administration over the past few months. Pechanga is dedicated to continuing to work with the Administration to resolve any potential outstanding issues they may have in order to gain the Administration's support of our bill.

Water is central to who we are as a people. The name Pechanga means at Pechaa'a, at the place where water drips. It is a spring on our reservation. Our tribal government is committed to protecting our surface and groundwater resources and the availability of water for our community to ensure that we can provide water to our tribal members for the next 100 years. As the tribal chairman and as a father, I am committed to making sure that my generation guarantees a reliable water supply for the future of our people.

This settlement has been decades in the making and stems from a 1951 Federal District Court case known as *United States of America v. Fallbrook*, involving Pechanga and two other reservations in which the court determined that each of the tribes has a federally-reserved water right in the Santa Margarita River Basin for its respective reservation. The court also established a *prima facie* quantity for these federally reserved water rights in the Santa Margarita River watershed. But it did not formally and finally specify the actual amount of water to which each tribe is entitled.

This unfinished business resulting from the Fallbrook decree has left our tribe in the unenviable position of owning a right that we cannot actually use. Over the past few years, we have worked with those entities around Pechanga to develop agreements for cooperatively managing the limited water resources in the Santa Margarita Basin. These efforts of negotiated management of water resources were successful and resulted in a groundwater management agreement with RCWD in 2006 and a recycled water agreement with Eastern Municipal Water District in 2007.

While both of these agreements have been successfully implemented and are in fact in effect today, neither of these agreements address the fundamental question of the quantity of water to which we are entitled for the Santa Margarita River system. Nor do they address the question of the infrastructure necessary to put those rights to use on tribal lands or the claims we may have against others, including the United States, for others' unauthorized use of our water in years gone by.

The bill before you today is a result of hard work and compromise by all the parties involved. Our written testimony provides an in-depth description of the Pechanga settlement. Today I will briefly outline the provisions of the settlement that are particularly important to Pechanga.

First, the settlement agreement recognizes and quantifies Pechanga's federally-reserved right to water in the Santa Margarita River Basin, an essential element for the Band's future in this arid part of the Country.

Second, through the settlement agreement, the Band is able to extend Metropolitan's existing service area on the reservation to a greater portion of the reservation, so that Pechanga becomes an MWD customer, with the ability to receive imported water to fulfill the Band's future water needs that will undoubtedly exceed the water available today in our portion of the Basin. This component of the settlement is critically important, because it allows Pechanga to get the necessary imported water from Metropolitan that we will need in the long term to supplement our groundwater supply.

Finally, the settlement provides funding for necessary infrastructure for Pechanga to receive Metropolitan water, to pay connection fees to Metropolitan and to Eastern and provides a subsidy to bring down the cost of the extremely expensive Metropolitan water that we are accepting in lieu of our unfulfilled claims to the waters of the Santa Margarita Basin.

All of these elements were carefully constructed to create a settlement that is beneficial to all the parties involved, while recognizing the U.S. must fulfill its trust responsibilities to Pechanga. This is a fair and cost-effective water settlement. We believe that

the Federal contribution of approximately \$40 million is justified by Pechanga's waivers of its substantial claims against the U.S. and recognizes the United States' programmatic responsibility to the Band.

In closing, I cannot emphasize enough how important it is that this settlement will provide a wet water settlement to Pechanga, and not a useless water right. I would like to thank you, Chairwoman Cantwell, for moving this bill along and hearing this today. Thank you.

[The prepared statement of Mr. Macarro follows:]

PREPARED STATEMENT OF HON. MARK MACARRO, CHAIRMAN, PECHANGA BAND OF  
LUISEÑO INDIANS

S. 1219

Good afternoon Chairwoman Cantwell, Vice Chairman Barrasso, and members of the Committee. Thank you for scheduling a hearing on S. 1219 and the opportunity to provide testimony on behalf of the Pechanga Band of Luiseño Mission Indians.

I first want to thank Senator Boxer, along with co-sponsor Senator Feinstein, for their introduction and continued support of this important piece of legislation.

This water settlement is critical to settle once and for all the Band's longstanding water claims in the Santa Margarita River Watershed, provide the resources to meet the Band's current and future water needs and most importantly provide the Band with "wet" water. Not only does the settlement provide certainty as to the Band's water rights but it also provides certainty for all water users in the Santa Margarita River Watershed. This settlement is the product of a great deal of effort by all of the parties and reflects a desire by the parties to settle their differences through negotiation rather than litigation.

## **I. BACKGROUND**

### **A. Background on the Pechanga Band**

The Pechanga Band of Luiseño Mission Indians (the "Band" or "Pechanga") is a federally recognized Indian tribe with a reservation of over 6,000 acres located northeast of San Diego, California, near the city of Temecula. Pechanga Creek, a tributary of the Santa Margarita River, runs through the length of the Pechanga Reservation.

The Band has called the Temecula Valley home for more than 10,000 years. Ten thousand years from now tribal elders will share with tribal youth, as they do today, the story of the Band's creation in this place. Since time immemorial, through periods of plenty, scarcity and adversity, the Pechanga people have governed ourselves and cared for our lands.

The history of the Band begins with our ancestral home village of Temeeku, which was a center for all the Payomkawichum, or Luiseño people. After the establishment of the state of California in 1850, a group of Temecula Valley ranchers petitioned the District Court in San Francisco for a Decree of Ejection of Indians living on the land in Temecula Valley, which the court granted in 1873. In 1875 the sheriff of San Diego County began three days of evictions. The Luiseño people were taken into the hills south of the Temecula River.

Being strong of spirit, most of our dispossessed ancestors moved upstream to a small, secluded valley, where they built new homes and re-established their lives. A spring located two miles upstream in a canyon provided them with water; the spring we have always called Pechaa'a

(from pechaq = to drip). This spring is the namesake for Pechaa'anga or Pechaanga, which means "at Pochaa'a, at the place where water drips."

On June 27, 1882, seven years after being evicted, the President of the United States issued an Executive Order establishing the Pechanga Indian Reservation.<sup>1</sup> Several subsequent trust acquisitions were made in 1893,<sup>2</sup> 1907,<sup>3</sup> 1931,<sup>4</sup> 1971,<sup>5</sup> 1988,<sup>6</sup> and 2008,<sup>7</sup> each one increasing the size of the reservation. At present, the total land area of the Pechanga Reservation is 6,724 acres.

Water is central to who we are as a people. Today, our tribal government operations, such as our environmental monitoring and natural resource management programs, exist to fully honor and protect the land and our culture upon it. In particular, we are concerned about watershed and wellhead protection for our surface and ground water resources and the availability of water for our community. Accordingly, it is of utmost importance to the Band that our water rights are federally recognized in order to protect our water in the basin and ensure that the basin will continue to provide for generations of Pechanga people in the future.

#### **B. History of Pechanga's Efforts to Protect its Water Rights**

The Band has been engaged in a struggle for recognition and protection of our federally reserved water rights for decades. In 1951, the United States initiated litigation over water rights in the Santa Margarita River Watershed known as *United States v. Fallbrook*.<sup>8</sup> The *Fallbrook* litigation eventually expanded to include all water users within the Santa Margarita Watershed, including three Indian Tribes – Pechanga, Ramona Band of Cahuilla Indians ("Ramona"), and Cahuilla Band of Indians ("Cahuilla").

The United States, as trustee, represented all three Tribes before the *Fallbrook* Court. In a series of Interlocutory Judgments that were eventually wrapped into the Court's Modified Final Judgment and Decree,<sup>9</sup> the Court examined and established water rights for various water users involved in the case. In Interlocutory Judgment 41 ("IJ 41"), the Court concluded that each of the three Tribes has a recognized federally reserved water right without specifying the amount of each of the Tribe's water right. Although the Court did examine some facts in IJ 41 and developed "prima facie" findings with respect to each of the Tribes' quantifiable water rights,

<sup>1</sup> Executive Order (June 27, 1882).

<sup>2</sup> Trust Patent (Aug. 29, 1893).

<sup>3</sup> Executive Order (Jan. 9, 1907) and Little Temecula Grant, Lot E (Mar. 11, 1907) (commonly referred to as the Kelsey Tract).

<sup>4</sup> Trust Patent (May 25, 1931).

<sup>5</sup> Trust Patent (Aug. 12, 1971).

<sup>6</sup> Southern California Indian Land Transfer Act, P.L. 110-581 (Nov. 1, 1988).

<sup>7</sup> Pechanga Band of Luiseno Mission Indians Land Transfer Act, P.L. 110-383 (Oct. 10, 2008).

<sup>8</sup> *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.).

<sup>9</sup> Modified Final Judgment and Decree, *United States v. Fallbrook Public Utility District et al.*, Civ. No. 3:51-cv-01247 (S.D.C.A.) (Apr. 6, 1966).

final quantified rights were never established as a matter of law. As a result of IJ 41, all three Tribes have "Decreed" but "unquantified" federally reserved water rights.<sup>10</sup>

In 1974, Pechanga filed a motion with the *Fallbrook* Court to intervene as a plaintiff-intervenor and a party to the proceeding on its own behalf. In 1975 the Court granted Pechanga's Motion and Pechanga filed a complaint to enjoin certain defendants from using more than their respective entitlements under the *Fallbrook* Decree. This complaint was subsequently resolved and the Band has remained a party to the *Fallbrook* proceedings ever since. Pechanga has not filed a motion to finally quantify its federally reserved water rights.

Until recently, we sought to avoid litigation and instead work with those entities around Pechanga to develop mutual private agreements for sharing the limited water resources in our basin. Specifically, in an effort to collaboratively develop a means of providing assured water supplies and cooperative management of a common water basin, the Band adopted an approach of negotiation and reconciliation with the primary water users in its portion of the Santa Margarita River Watershed, primarily the Rancho California Water District ("RCWD") and the Eastern Municipal Water District ("EMWD").

These efforts at negotiated management of water resources were successful and resulted in the Groundwater Management Agreement between the Band and RCWD in 2006, and a Recycled Water Agreement between EMWD and the Band in 2007, with the recycled water being delivered to the Band by RCWD. Both of these agreements have been successfully implemented and are in effect today. Significantly, though successful, neither of these agreements sought to address the scope of the Band's overall water rights to the Santa Margarita River Watershed or settle its various claims related to the *Fallbrook* Decree.

Beginning in 2006 and continuing throughout 2007, the other two tribes in the Santa Margarita River Watershed, Ramona Band of Cahuilla Indians and Cahuilla Band of Indians sought to intervene in the *Fallbrook* case to, among other things, quantify their respective water rights to the Santa Margarita River Watershed.<sup>11</sup> These efforts intersected the Band's otherwise successful efforts at negotiated management of joint water supplies and forced the Band to address in *Fallbrook* the scope of its own claims to water or risk being injured by the actions of the other two Tribes.<sup>12</sup>

In addition to participating as a litigant in the proceedings initiated by Ramona and Cahuilla, the Band also immediately started efforts to reach a settlement of its claims to water and claims for injuries to water rights relating to the Santa Margarita River Watershed. As part

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<sup>10</sup> The Court in *Fallbrook* fixed the quantity of Pechanga's federally reserved right at 4,994 APY, on a prima facie basis.

<sup>11</sup> Ramona and Cahuilla are located within the Anza-Cahuilla Sub-Basin of the Santa Margarita River Watershed while Pechanga is located within the Wolf Valley Sub-Basin of the Santa Margarita River Watershed.

<sup>12</sup> Pechanga periodically filed status reports with the *Fallbrook* court apprising the Court of its progress towards reaching settlement. Pechanga also filed documents with the Court requesting that Pechanga be afforded the opportunity to weigh in when the Court considered issues of law and legal interpretations of IJ 41 with respect to Ramona and Cahuilla.

of its efforts to seek settlement of its claims to water, on March 13, 2008, Pechanga requested that the Secretary of the Interior seek settlement of the water rights claims involving Pechanga, the United States, and non-Federal third parties through the formation of a Federal Negotiation Team under the Criteria and Procedures for Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims.<sup>13</sup> The Secretary agreed to form a Federal Negotiation Team on August 1, 2008.

Since that time Pechanga has been working closely with the Federal Negotiation Team to effectively negotiate the terms of the settlement with the other parties and to resolve its claims against the United States in connection with the development and protection of Pechanga's water rights. Pechanga and the Federal Negotiation Team carefully examined the overarching Settlement Agreement, along with the exhibits, and have continued to have a productive dialogue to resolve questions and concerns that the Federal Negotiation Team raised. The Federal Negotiation Team has presented its assessment report to the Administration Working Group, comprised of policy members from the Administration. Pechanga has also met with members of the Administration Working Group to discuss the Administration's outstanding concerns. In Pechanga's perspective, all of these meetings with the Federal Negotiation Team and the Administration Working Group have been extremely productive.

Pechanga has continued to meet with the Administration to discuss and address their outstanding concerns with the legislation and settlement, which will be included in their testimony before the Committee today. While Pechanga recognizes that we have come a long way towards meeting the Administration's concern in order to garner their support we know that there are still remaining issues that must be addressed before we can gain full Administration support. Pechanga remains committed to continuing these discussions with the Administration to resolve expeditiously any of their remaining concerns.

Pechanga has also continued to work with the other settling parties, including RCWD and EMWD, to ensure that the parties are still on the same page with respect to the legislation. Since the bill's original introduction in the 111<sup>th</sup> Congress and now with the current bill pending before the Committee, the parties have communicated and discussed ways in which the legislation could even be improved. Thus, there may be a few revisions to the bill that the parties may suggest in order to fully effectuate the intent of the parties and resolve any technical issues with the legislation that can be resolved between the hearing of this bill and mark-up out of the Committee for full Senate consideration.

### C. Legislative History

#### 1. 111<sup>th</sup> Congress

The Pechanga Water Rights Settlement Act was first introduced in the 111<sup>th</sup> Congress. On December 11, 2009, Congresswoman Bono Mack, along with co-sponsors Congressman Calvert, Congressman Issa, Congresswoman Richardson, Congressman Grijalva and Congressman Baca introduced H.R. 4285 in the House. On January 26, 2010, Senator Boxer,

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<sup>13</sup> 55 Fed. Reg. 9223.



along with co-sponsor Senator Feinstein introduced an identical bill in the Senate, S. 2956. Subsequently, the bill was reintroduced in the House by Congressman Baca, along with co-sponsors Congressman Boren, Congressman Grijalva, Congressman Honda, Congressman Kildee, Congressman Lujan and Congresswoman Richardson in an effort to resolve some of the issues that the Administration raised with the legislation.

The Senate Committee on Indian Affairs held a hearing on S. 2956 on July 22, 2010 and ordered the bill to be reported favorably out of committee with amendments on November 18, 2010. The House Natural Resources Subcommittee on Water and Power held a hearing on H.R. 5413 on September 16, 2010.

At the close of the 111<sup>th</sup> Congress, the Band chose to pull back from seeking Congressional enactment of the bill in order to answer questions that tribal members and allottees had raised during the legislative process. It was critical to the Band that its membership and allottees be fully informed of the aspects and details of the legislation and settlement agreement. Thus, over the past three years the Band held a number of tribal member meetings to more fully discuss and explain the Pechanga Water Settlement and the benefits afforded under the legislation. The Band held a tribal membership vote on March 24, 2013, in which tribal members voted overwhelmingly in support of the proposed water settlement currently pending before the Committee. The Band felt this was a necessary and important step and as a result is now prepared to move forward to enact this legislation as expeditiously as possible.

## 2. 113<sup>th</sup> Congress

On June 25, 2013, Senator Boxer, with Senator Feinstein joining as a co-sponsor, introduced S. 1219. On June 26, 2013, Congressman Calvert, joined by twelve co-sponsors, Congressman Tony Cardenas, Congressman Tom Cole, Congressman Paul Cook, Congressman Joff Denham, Congressman Raul Grijalva, Congressman Duncan Hunter, Congressman Darell Issa, Congressman Daniel Kildee, Congressman Doug LaMalfa, Congresswoman Betty McCollum, Congressman Raul Ruiz, and Congressman David Valadao, introduced H.R. 2508, the companion measure to S. 1219.

## II. **STRUCTURE OF SETTLEMENT**

The Pechanga Settlement Agreement is a comprehensive settlement agreement among Pechanga, the United States, RCWD and EMWD, that incorporates a number of agreements as exhibits to the overarching settlement agreement. The Pechanga Settlement Agreement includes the following agreements as exhibits:

- A. Amended and Restated Groundwater Management Agreement ("Amended GMA");
- B. Recycled Water Agreement and Amendment No. 1 to the Recycled Water Agreement;
- C. Recycled Water Transfer Agreement;
- D. Recycled Water Scheduling Agreement;
- E. Recycled Water Infrastructure Agreement;

- F. Extension of Service Area Agreement;
- G. ESAA Capacity Agreement; and
- H. ESAA Water Delivery Agreement.

Together, the Pechanga Settlement Agreement and corresponding exhibits provide the necessary agreements to resolve Pechanga's longstanding claims to water rights in the Santa Margarita River Watershed, secure necessary water supplies to meet Pechanga's current and future water needs and provide sufficient terms to make the settlement work for RCWD and its customers. S. 1219 approves the Pechanga Settlement Agreement, including all its exhibits.

#### A. Recognition of Tribal Water Right

A critical element of the settlement is recognition of the Band's federal reserved right to water (the "Tribal Water Right"). Both the Pechanga Settlement Agreement and this federal legislation recognize the Band's Tribal Water Right as being the same as it was established on a "prima facie" basis in the original *Fallbrook* Decree in 1965.

The United States has analyzed the water rights for the Pechanga Reservation on at least two occasions. First, in 1938, the Bureau of Indian Affairs provided a water rights study of the Pechanga Indian Reservation within the Santa Margarita River Watershed. Second, in 1997, the United States' hydrological expert provided a report summarizing his findings of a Practicably Irrigable Acreage ("PIA") study (irrigation water claim) for the Pechanga Reservation. Both reports support a prima facie claim of 4,994 AFY for the Pechanga Reservation and further support the need for supplementary water supplies in addition to groundwater on the Pechanga Reservation.<sup>14</sup>

The Tribal Water Right will also be adopted and confirmed by decree by the *Fallbrook* federal district court. This is especially important for the Band as it constitutes the full recognition of its water entitlements under the *Fallbrook* Decree.

#### B. Protection of Allottee Rights

Pechanga has worked closely with the Federal Negotiation Team to ensure that the allottee rights on the Pechanga Reservation were adequately protected in S. 1219. First, pursuant to Section 5(a) of S. 1219, allottees will receive benefits that are equivalent to or exceed the benefits they currently possess.<sup>15</sup> Furthermore, in accordance with Section 5(d) of S. 1219, 25 U.S.C. 381 (governing use of water for irrigation purposes) shall specifically apply to the

<sup>14</sup> The Band's analysis revealed that its water right claims for its existing reservation exceed 4,994 acre-feet, analysis challenged by RCWD, among others. The Band's settlement fixes its water rights entitlements in the Santa Margarita River Basin at 4,994 acre-feet per year in recognition of the fact that this amount is judicially established on a prima facie basis and therefore a number that could form the basis for ready agreement by all parties to the settlement.

<sup>15</sup> See Sec. 5(a).

allottees' rights. Under S. 1219, the Tribal Water Code to be adopted by the Band must provide explicit protections for allottees—the Tribal Water Code must provide that:

- tribal allocations of water to allottees shall be satisfied with water from the Tribal Water Right;
- charges for delivery of water for irrigation purposes for allottees be assessed on a just and equitable basis;
- there is a process for an allottee to request that the Band provide water for irrigation use to the allottee;
- there is a due process system for the Band to consider a request by an allottee (appeal and adjudication of any denied or disputed distribution of water and resolution of any contested administrative decision).<sup>16</sup>

The inclusion of these provisions reflects the United States' most recent allottee language as was included in other recent Indian water settlements. As a result, the allottee language is consistent with other Indian water settlements pending before Congress, and provides allottees with the same protections provided to other tribal allottees.

#### **C. Contractual Acceptance of Guaranteed Water Sources to Fulfill the Tribal Water Right**

Unfortunately, there is insufficient groundwater within the Santa Margarita River Watershed to fulfill the Band's claims to water.<sup>17</sup> To account for the limited water sources within the Santa Margarita River Watershed, additional water sources are needed to fulfill the Band's entitlement to water. Accordingly, pursuant to the Pechanga Settlement Agreement and the corresponding exhibits, in addition to the groundwater supply available from the basin itself, the Band's entitlement to water will be fulfilled through a number of contractual agreements.

There are three major components of the settlement:

##### **1. Amended Groundwater Management Agreement ("Amended GMA")**

The Amended GMA, between Pechanga and RCWD, is an integral part of the Pechanga Settlement Agreement, as it sets forth the terms and conditions governing the parties' joint management of groundwater pumping from the Wolf Valley Basin and establishes an allocation of the safe yield of the basin. As part of the Amended GMA, the parties established, through technical review, that the safe yield of the Wolf Valley Basin is 2,100 AFY. The parties agreed

<sup>16</sup> See Sec. 5(f).

<sup>17</sup> The need to import water to the Reservation is a fact that has been recognized by the federal team for a long period of time. Over pumping in the basin has significantly reduced water levels over time, which is one cause for the insufficient groundwater to satisfy the Band's federally reserved water rights. One important aspect of the settlement is the establishment of groundwater pumping limits to protect the basin now and in the future.

that Pechanga is entitled to 75% (1575 AFY) of the basin and RCWD is entitled to 25% (525 AFY) of the basin. Additionally, in an effort to raise the level of water in the Wolf Valley Basin and provide storage water in years of water shortage, the Amended GMA establishes a Carryover Account between Pechanga and RCWD that provides for use of the Wolf Valley Basin as a storage aquifer for a defined amount of water to be used in shortage years. Thus, the Amended GMA not only satisfies 1575 acre feet of water per year of the Band's entitlement to water, it also provides benefits to the entire region by improving the water levels in the Wolf Valley Basin.

## 2. Recycled Water Agreements

Another essential element of the Pechanga Settlement Agreement is RCWD's ability to use Pechanga's recycled water in partial consideration for their surrender of a portion of their current potable water supply as pumped from the Wolf Valley Basin. In particular, Amendment No. 1 to Pechanga's Recycled Water Agreement<sup>19</sup> allows RCWD to utilize the unused portion of the entitlement Pechanga currently has pursuant to the Recycled Water Agreement and provides an extension of the term of the Recycled Water Agreement for 50 years with 2 additional 20 year extensions.

In conjunction with Amendment No. 1, the Pechanga Settlement Agreement incorporates the Recycled Water Transfer Agreement, the Recycled Water Scheduling Agreement and the Recycled Water Infrastructure Agreement. Together, these three agreements provide for the mechanisms and infrastructure necessary to provide RCWD with the ability to utilize Pechanga's unused portion of recycled water. More specifically, the Recycled Water Transfer Agreement provides that Pechanga agrees to transfer to RCWD a portion (not less than 300 AFY, and not more than 475 AFY) of the EMWD recycled water to which Pechanga is entitled pursuant to that agreement. The Recycled Water Infrastructure Agreement provides for the development and construction of facilities necessary for RCWD to utilize the recycled water allocated to it pursuant to the settlement. Lastly, the Recycled Water Scheduling Agreement provides the protocol for ordering and delivering the portion of Pechanga's allocation of EMWD recycled water to RCWD.

## 3. Imported Water Agreements

Because the water supplies in the Band's portion of the Santa Margarita Basin are either too depleted to fulfill the Band's entire water needs in the medium to long term or are being used by other parties (primarily RCWD), the Band has agreed to use replacement water for the majority of its water uses in future. Accordingly, another significant component of the Pechanga Settlement Agreement is comprised of the agreements necessary to provide MWD imported potable water to Pechanga to provide for the Band's water needs on a permanent basis. The Extension of Service Area Agreement ("ESAA"), is the primary agreement for providing MWD water to be used on the Reservation. The ESAA is a contractual agreement among Pechanga, EMWD and MWD that extends MWD's existing service area within the Band's Reservation to a

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<sup>19</sup> The Recycled Water Agreement, between Pechanga and EMWD, was executed on January 8, 2007 and provides Pechanga with 1,000 AFY of recycled water from EMWD.

larger portion of the Reservation, such that Pechanga will receive MWD water to augment its local pumped supplies.

In order to implement the ESAA, two additional agreements were necessary—the ESAA Capacity Agreement and the ESAA Water Delivery Agreement. The ESAA Capacity Agreement establishes the terms and conditions for RCWD to provide water delivery capacity of the ESAA water to Pechanga. The ESAA Water Delivery Agreement addresses service issues and billing issues related to the delivery of ESAA water to Pechanga.

### III. JUSTIFICATION OF FEDERAL CONTRIBUTION

Pechanga recognizes that the United States is always concerned in Indian water settlements with the overall cost of an Indian water rights settlement, and more specifically, the Federal contribution to such settlements. The Band further recognizes that Federal funds are limited and that we are living in extremely difficult economic times. Accordingly, Pechanga has worked very hard to ensure that the Federal contribution to the Pechanga Settlement Agreement is justified and properly reflects the United States' liability and programmatic responsibility to the Band.

#### A. Federal Programmatic Responsibility to the Band

The Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims ("Criteria and Procedures") provides that Federal contributions to a settlement may include costs related to the Federal trust or programmatic responsibilities.<sup>19</sup> The United States argued in the *Fallbrook* proceedings that Pechanga has an entitlement to 4,994 acre feet per year in the Santa Margarita River Watershed, and the court adopted the United States' position on a prima facie basis. Moreover, as recognized by the United States, local water supplies, both on the Reservation and in adjacent areas were adequate and capable of being developed in an economically feasible manner to fulfill at least the 4,994 acre-feet per year that the United States had argued for in the *Fallbrook* proceedings in 1958.

As discussed above, the Band must obtain some imported water from MWD as a replacement for its entitlement to local water from the Santa Margarita River Watershed. In accordance with the Criteria and Procedures the United States has a programmatic responsibility to ensure that the Band's water right entitlement is fulfilled through replacement water if existing water on or near the Pechanga Reservation is not currently available. The United States must also ensure that there is sufficient infrastructure for the Band to receive the replacement water. The primary source of replacement water in this case is water from MWD pursuant to the ESAA.

In order for the Band to receive replacement water, the parties must enhance the capacity for delivery of ESAA Water (water from MWD) through infrastructure development as necessary

<sup>19</sup> See Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 35 Fed. Reg. 9223 (Mar. 12, 1970).

to allow for deliveries to the Band. The parties negotiated a number of agreements, the various components of which achieve this goal.

Accordingly, the Pechanga Water Settlement Act provides funding for the necessary infrastructure to fulfill the United States' trust and programmatic responsibility to deliver adequate replacement water to the Band to fulfill its entitlement. The Pechanga Water Settlement Act also provides for a subsidy fund that will bring down somewhat the cost of the expensive ESAA Water, which is an element that is consistent with the United States' contribution to most other Indian water rights settlements.<sup>20</sup>

#### B. Potential Federal Liability to the Band

In addition to its programmatic responsibilities, the federal government has an obligation to every federally recognized Indian tribe to protect its land and water resources. Indeed, a core principle of Federal Indian law is that when the United States sets aside and reserves land for Indian tribes, such reservation includes all the water necessary to make their reservations livable as permanent homelands.<sup>21</sup> The United States in turn holds these reserved water rights in trust for an Indian Tribe.<sup>22</sup>

Congress has expressly found that "the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources."<sup>23</sup> The Department of Interior has similarly found that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians."<sup>24</sup> Courts have also recognized the federal trust responsibility for Indian water rights.<sup>25</sup>

Accordingly, a tribe may recover substantial monetary damages from the United States if it can be shown that the tribe suffered a loss of water or water rights.<sup>26</sup>

<sup>20</sup> See e.g., Arizona Water Settlements Act, Pub. L. 108-451, § 107; Claims Resolution act of 2010, Title IV, Crow Tribe Water Rights Settlement, Pub. L. 111-291, §§ 411(c)(3) & (4).

<sup>21</sup> See generally, *Winters v. United States*, 207 U.S. 564 (1908); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* ("Gila V"), 35 P.3d 68 (Ariz. 2001).

<sup>22</sup> *Id.*

<sup>23</sup> See e.g., Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4600, 4695 (codified by reference at 43 U.S.C. § 371 (2000)).

<sup>24</sup> See Working Group on Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990).

<sup>25</sup> See *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972).

<sup>26</sup> See e.g., *M. Paiute Nation v. United States*, 30 Ind. Cl. Comm'n. 210, 215-217 (1973); *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n. 256 (1973); see also, Cohen's Handbook of Federal Indian Law § 19.06, at 1225 n. 400. For instance, in *Pyramid Lake Paiute Tribe*, the court held that the Secretary of Interior was obligated to fulfill its trust responsibility to the tribe in allocating the excess waters of the Truckee River between the federal reclamation project and the reservation and not to reconcile competing claims to water. In *Gila River Pima-Maricopa Indian Community v. United States*, the tribe was able to establish its right to relief based on the federal government's failure to take action when upstream diversions interfered with the water supply to the Gila River.

Since establishing the Pechanga Reservation, the United States has systematically failed to protect and adequately manage the Band's water resources. This failure has resulted in the loss of Tribal water use and other Reservation resources, and has prevented the Band from fulfilling the purposes of the Reservation. In addition to this general overarching claim, which has the potential on its own, of reaching into the tens of millions of dollars, the Band also has numerous, very specific claims that it is waiving, with an estimated potential value for each, that, in combination with the United States' programmatic responsibility to the Tribe as outlined above, provides substantial justification for the overall Federal contribution.

We discuss these claims and the potential monetary liability of the Federal Government below.

1. The Band's claims for mismanagement and failure to protect and promote the Band's water resources

In *Fallbrook*, the court held in IJ 41, that the United States "intended to reserve, and did reserve rights to the waters of the Santa Margarita River stream system which under natural conditions would be physically available on the Pechanga Indian Reservation, including rights to the use of ground waters sufficient for the present and future needs of the Indians residing thereon with priority dates of June 27, 1882, for those lands established by the Executive Order of that date; January 9, 1907 for those lands transferred by the Executive Order of that date; August 29, 1893 for those lands added to the Reservation by Patent on that date; and May 25, 1931, for those lands added to the Reservation by Patent of that date."<sup>27</sup> Based on IJ 41, the United States recognized reserved water rights for the Pechanga. Similar to the *Gila River* case,<sup>28</sup> the federal government has a compensable fiduciary duty to Pechanga with respect to the Band's water rights.

Indeed, although the government has failed to satisfy this obligation, its actions indicate that it has recognized this duty. For instance, the United States through the Bureau of Indian Affairs ("BIA") recognized that Pechanga had a paramount right to water which impacted BIA's actions on behalf of the Band.<sup>29</sup> Further, as part of this special relationship, Pechanga requested

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Reservation. The Claims Court specifically held that "the actions taken by the United States in establishing the reservation in 1859 and in enlarging it thereafter, together with repeated recognition of the need to preserve or restore the water supply utilized by the Pimas and Maricopas in maintaining their commendable self-sufficient status, are consistent only with the existence of a special relationship between these Indians and the United States concerning the protection of their lands and the water supply they utilized on these lands."

<sup>27</sup> *Supra* note 11 at 13-14.

<sup>28</sup> *Id.*

<sup>29</sup> See Pechanga Summary at 41 (Letter from BIA Sacramento Area Director to Regional Director which protested that the Regional Director's Report on the Santa Margarita Project of 1970 "did not recognize the rights of Indian reservations to underground water supplies that had been established in *Winters v. United States*, 1908, 207 US 564 and confirmed in several subsequent cases....and that the Indians had a paramount right.").

on numerous occasions for the BIA to conduct water supply studies and take other action in order to protect the Band's water rights and water supply.<sup>30</sup>

In the face of the Band's requests however, the United States Government took no action to protect the Band's water rights or if they did finally take action, it was delayed to the point where the action was ineffective. For instance, in response to the Band's resolution with respect to RCWD's pumping activities, the Interior Department officially requested the Justice Department to advise RCWD that its pumping activities were in violation of a 1940 Stipulated Agreement.<sup>31</sup> The Justice Department however declined to advise Rancho California of its unlawful action because of an objection by the United States Navy. Furthermore, the Bureau of Reclamation's plans for construction of the Santa Margarita Project on the Santa Margarita River to benefit the Fallbrook Public Utility District and Camp Pendleton included an allowance of only 1,000 acre feet of water from the Murrieta-Temecula groundwater basin for Pechanga Reservation, despite the BIA's estimation that the reservation would need 5,000 acre feet.<sup>32</sup>

In response to the Santa Margarita Project's failure to adequately account for the Pechanga's water rights, the Band passed two resolutions with respect to their water supply. The first requested that the Secretary of Interior "withhold approval of the Santa Margarita Project until adequate provision has been made for protection and development of the Pechanga Band's Winters Doctrine rights."<sup>33</sup> The second resolution asked the United States Attorney General to reopen *United States v. Fallbrook* "to restructure the decree in accordance with the instructions from the Ninth Circuit of Appeal to the end that the decree may become, as it was intended, an instrument for the protection of the Winters Doctrine rights of the Pechanga Band."<sup>34</sup>

The BIA Sacramento Area Director agreed with the Band.<sup>35</sup> He recommended that "the Secretary demand Justice to stop all pumping of the groundwater now in violation of the existing decree and stipulation until such time as the Pechanga Band and the Secretary have documentary evidence that the pumping by Rancho California is not affecting the groundwater rights of the Pechanga Band. The United States as trustee for these water rights has no alternative!"<sup>36</sup> In

<sup>30</sup> For example, on November 18, 1969, the Pechanga Band passed a resolution calling upon the BIA to conduct an economic development and land use study of the reservation, to inform RCWD that it was not permitted, under the terms of the 1940 Stipulated Agreement to pump water from the Temecula Murrieta ground water basin, and that the Band would oppose any modification of that Judgment until the Band's water rights and water supply were at least as well protected as under that judgment and the Band was provided with the means to make beneficial use of the water needed to fulfill its economic and land use goals. See Pechanga Summary at 38-39.

<sup>31</sup> On December 26, 1940, a Judgment was rendered in the Superior Court of the State of California on a case between Rancho Santa Margarita, a corporation, *Plaintiff v. N.R. Vail et al.* (Vail family descendants), Defendants, with Guy Bogart et al, (individuals with riparian rights to Santa Margarita River waters), as Intervenor. The court found that defendants, plaintiffs, and intervenors had rights to the waters of the Temecula-Santa Margarita and its tributaries. It spelled out the rights of each, and provided that a number of gaging stations and meters be set up to measure the flow of water. See Pechanga Water Summary at 29.

<sup>32</sup> *Id.* at 45.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 47 ("We are in complete agreement with the Band.")

<sup>36</sup> *Id.*



response to the BIA Area Director's recommendation, the Solicitor's Office stated that "[t]he Department of Justice points out that where the Department of Defense is the beneficial holder of the right and refuses to have that right interfered with that the United States can bring the action only if we can demonstrate that the reserved right of the Indians is being jeopardized."<sup>37</sup> Again, the Sacramento Area Director recommended that the Secretary of Interior demand that the Justice Department stop groundwater pumping until it was proved that the pumping had not affected the groundwater rights of the Indians.<sup>38</sup> It was not until January 26, 1973 that funds were finally made available for United States Geological Services to undertake a water resources study of Pechanga Reservation.<sup>39</sup>

Given this clear history of the U.S. Government's failure to protect the Band's water rights, the Pechanga Band, and several other California tribes in similar circumstances, successfully sued the federal government in the Indian Claims Commission for, among other things, its failure to protect and preserve the plaintiffs' reserved water rights from non-Indian interference, failure to provide or maintain necessary reservation irrigation systems, and the improper taking of aboriginal water rights. The case was settled in 1993 when six of the Tribes, including Pechanga, accepted \$7,500,000.00 in settlement of the pending claims. Notwithstanding the payment of this claim in satisfaction of these breaches of trust, since 1993, the government has continued to breach its trust obligation to the Band by failing to protect and preserve the plaintiffs' reserved water rights from non-Indian interference and by failing to provide necessary water to the Pechanga Reservation. In other words, the government has not protected the Band's water rights despite its admitted failure to do so.

This failure has now been compounded by the fact that since 1993, there has been tremendous population growth in the area. Accordingly, significant additional non-Indian diversions and groundwater pumping from the Band's water resources has damaged the primary aquifer that would otherwise help serve the water needs of the Reservation. In particular, continuous over-pumping beyond the yearly safe yield by non-Indian parties has damaged the aquifer and severely limited the amount of water the Band can now pump itself to serve the purposes of the Reservation. As a result, the Band has had to enter into a series of agreements on its own, without the assistance of the United States, to secure an adequate water supply for the Pechanga homeland but is still short of fulfilling the purposes of the Reservation.<sup>40</sup>

The aggregate sum of the potential exposure and liability of the United States stretches into the hundreds of millions for these claims. Nevertheless, the Band conservatively estimates that these claims could result in a potential recovery in excess of \$72 million.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 49 ("Why does the burden of proof rest with the Indian people when it is the trustee's obligation to protect these rights?").

<sup>39</sup> *Id.* at 52.

<sup>40</sup> For instance, in 2006, the Band entered into the Groundwater Management Agreement with RCWD to provide for management of the Wolf Valley Water Basin and in 2007 the Band entered into the Recycled Water Agreement with Eastern Municipal Water District to provide for 1,000 AFY of recycled water to the Band.

2. A claim for the water the Band is giving up under the *Fallbrook* adjudication decree

Despite the government's failure to adequately represent the Band's interest in the *Fallbrook* adjudication and its failure to fully quantify and deliver water to the Pechanga Reservation, the Band has "paper" water rights under the final *Fallbrook* Decree. In IJ 41 (November, 8 1962), which became part of the final decree, the court held that Pechanga, and other nearby Tribes, had a federally reserved water right on their respective reservations. Specifically, the Court decreed that Pechanga had a "prima facie" entitlement to approximately 4,994 acre-feet of water per year for the Pechanga Reservation. Despite this legal entitlement, the Band has not received their entitlement in the form of actual water.

Under the proposed settlement, the Band will be waiving all of the claims described above against the United States to the lands described in IJ 41. The Band is also waiving claims for additional acreage that was not part of the Reservation at the time of IJ 41. As a result, the Band is giving up the right to adjudicate its water rights for the additional land, rights that would equate to a similar "prima facie" entitlement as IJ 41. Accordingly, the Tribal Water Right could potentially be more than twice the 4,994 AFY for which the Band is settling under the proposed settlement. The Band estimates that the value of these claims to water rights for the additional land being included in the Settlement is \$45-50 million.

**C. The Band's Waivers against the United States**

As part of the settlement, and subject to the retention of claims, the Pechanga Settlement Agreement and the legislation provide that the parties agree to waive their respective claims to water rights, claims to injuries to water rights, and claims to subsidence damage.

The Pechanga Settlement Agreement further provides that the Band will not seek enforcement of the Tribal Water Right as long as the Pechanga Settlement Agreement, including any of its Exhibits, remains in force and effect. With respect to its claims against the United States, subject to the retention of rights, the Band is waiving the following claims:

- (1) all claims against the United States, its agencies, or employees relating to claims for water rights in or water of the Santa Margarita River Watershed or any other river systems outside of the Santa Margarita River Watershed that the United States acting in its capacity as trustee for the Band asserted, or could have asserted, in any proceeding, including but not limited to *Fallbrook*;
- (2) all claims against the United States, its agencies, or employees relating to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including but not limited to damages, losses or injuries to hunting, fishing, gathering or cultural rights due to loss of water or water rights; claims relating to interference with, diversion or taking of water or water rights; or claims relating to failure to protect, acquire, replace, or develop water, water rights or water

infrastructure) in the Santa Margarita River Watershed that first accrued at any time up to and including June 30, 2009;

- (3) all claims against the United States, its agencies, or employees relating to the pending litigation of claims relating to the Band's water rights in *Fallbrook*; and
- (4) all claims against the United States, its agencies, or employees relating to the negotiation, execution or the adoption of the Pechanga Settlement Agreement, exhibits thereto, or the Act.

Thus, in exchange for the benefits received in the Pechanga Settlement Agreement and the Pechanga Water Rights Settlement Act, the Pechanga Settlement Agreement represents a complete replacement of, substitution for, and full satisfaction of, all the claims by Pechanga and the United States on behalf of Pechanga and allotees as set forth above.

#### **D. Breakdown of Federal Contribution**

In exchange for the Band's waivers against the United States and in recognition of the United States programmatic responsibility to the Band, the total Federal contribution as authorized by the S. 1219 is \$40,192,000. The Federal contribution is comprised of 4 major components:

##### **1. Pechanga Recycled Water Infrastructure--\$2,500,000.**

Section 11(a)(1) and Section 8(c) provide that funds from the Pechanga Recycled Water Infrastructure Account will be used to pay for the Storage Pond (\$2,500,000), as are necessary under the Recycled Water Infrastructure Agreement to fulfill Pechanga's obligations to provide RCWD with a share of Pechanga's recycled water which Pechanga receives pursuant to the Recycled Water Agreement with EMWD.

The version of the bill that was introduced in the 111<sup>th</sup> Congress provided for \$6,960,000 for the Pechanga Recycled Water Infrastructure Account, which included \$2,500,000 to pay for the storage ponds and \$4,460,000 to pay for the Demineralization and Brine Disposal Project. Based on further discussions with the Administration however, the Band agreed to revise the structure of the settlement accounts such that there is a separate account for recycled water infrastructure (the storage ponds) and a separate account for water quality (groundwater desalination activities) whereby the funds are distributed to the Band who then provides appropriate funds to RCWD in connection with their contribution to both of these efforts.

##### **2. Pechanga ESAA Delivery Capacity--\$23,000,000.**

Section 11(a)(2) and Section 8(d) provide that funds from the Pechanga ESAA Delivery Capacity Account will be used to pay for Interim Capacity (\$1,000,000) and Permanent Capacity (\$22,000,000) in accordance with the ESAA Capacity Agreement in order for RCWD to provide the requisite capacity to deliver groundwater and ESAA water to Pechanga.

To fulfill Pechanga's full entitlement of 4,994 AFY, Pechanga will need the Wolf Valley Basin groundwater and MWD imported potable water. In order to receive delivery of MWD imported potable, the MWD water would need to be delivered to Pechanga through offsite conveyance capacity. Available import delivery capacity in the region is limited, and thus posed a challenge. However, the parties were able to negotiate the ESAA Capacity Agreement such that RCWD will ensure that requisite capacity exists in RCWD's system to deliver Wolf Valley ground water and MWD imported water to Pechanga. Together, the Interim Capacity and Permanent Capacity funds will finance the necessary RCWD conveyance capacity. If RCWD is unable to ensure that there is sufficient capacity for groundwater and MWD deliveries to Pechanga, the Settlement Act provides that the funds in the ESAA Delivery Capacity Account shall be available to Pechanga to find alternative capacity. In the event that RCWD is unable to provide sufficient capacity, Pechanga would be forced to build its own infrastructure to deliver the imported water. Such infrastructure costs would total \$23,000,000, which is why the funds in the Pechanga ESAA Delivery Capacity Account were increased from \$17,900,000 (the amount in the 111<sup>th</sup> Congress bill) to \$23,000,000.

### 3. Pechanga Water Fund--\$12,232,000.

Section 11(a)(3) of the Act authorizes an appropriation of \$12,232,000 for deposit in the Pechanga Water Fund Account. In accordance with Section 9(d)(3)(D) of the Act, the Pechanga Water Fund Account will be used for: (1) payment of the EMWD Connection Fee (approximately \$332,000); (2) payment of the MWD Connection Fee (approximately \$1,900,000); and (3) any expenses, charges or fees incurred by Pechanga in connection with the delivery or use of water pursuant to the Settlement Agreement.

In order to receive MWD water there are certain fees associated with connection to EMWD and MWD, in addition to the cost of the expensive MWD water. Hence, the Pechanga Water Fund Account provides the funds necessary for Pechanga to receive MWD water. Those fees are as follows:

#### a. EMWD Connection Fee

The EMWD Connection Fee, approximately \$332,000, will be paid to EMWD as an in-lieu payment instead of standby charges which normally would be collected on an annual basis through the owner's property tax bill. Rather than have any fees that could be considered a tax on Pechanga, EMWD has agreed to a one-time payment by Pechanga for connection to EMWD.

#### b. MWD Connection Fee

Similar to the EMWD Connection Fee, MWD normally provides extension of their service through annexations. Rather than go through a normal annexation because of tribal sovereignty concerns, however, the ESAA will be governed by the terms and conditions of the agreement such that Pechanga will contractually commit to adhere to rules and regulations applicable to its activities as a customer of EMWD and MWD but that additional terms and conditions will be included to avoid infringement of Pechanga's sovereignty whereby EMWD and MWD will have alternative means to exercise their responsibilities. Under the ESAA

Pechanga has agreed to pay a one-time connection fee that amounts to approximately \$1,900,000.

c. Expenses, Fees, and Charges Associated with MWD Replacement Water

As discussed above, as a result of the depletion of the Santa Margarita Basin water supply, Pechanga must obtain imported water from MWD as a replacement for its water from the Santa Margarita Basin. The United States has a programmatic responsibility to ensure that Pechanga's entitlement is fulfilled through replacement water, such as the MWD imported water, if existing water is unavailable.<sup>41</sup> The Pechanga Water Fund provides a subsidy to bring down the cost of the expensive MWD imported water. The Pechanga Water Fund will provide funds to cover 10% of the cost of MWD water. This percentage is much less than that provided in other Tribal water settlements. In comparison, the Arizona Water Settlement Tribes receive 58-60% of the cost for Central Arizona Project water, their alternate water supply. Further, while the absolute cost of MWD water is significantly higher than that in neighboring states, the percentage to be provided by the Pechanga Water Fund is significantly lower than comparable settlements in further recognition of the unique economic times we are experiencing.

The Band significantly reduced the amount of funds for the subsidy from the Senate version of the bill in the 111<sup>th</sup> Congress to the current bill before the Committee. The previous authorization for the Pechanga Water Fund Account was \$25,382,000. Again, Pechanga recognizes that we are operating in difficult economic times and was thus willing to reduce the subsidy authorization to address the Administration's concerns, however, the Band strongly believes that the Administration should subsidize at least a portion of the cost of the expensive imported water that the Band is forced to use in place of lack of ground water left available for its use locally.

4. Pechanga Water Quality Account--\$2,460,000.

As discussed above, the Band agreed to create a separate account for water quality to fund groundwater desalination activities within the Wolf Valley Basin to address the Administration's concern that funding under the Act be directly appropriated to the Band. The Band and RCWD are both committed to reducing the levels of brine and salinity in the Wolf Valley Basin, especially given the fact that the imported water from MWD has a higher salinity level than the groundwater in the Wolf Valley Basin. The Band and RCWD have worked to provide recycled water infrastructure, as described more fully in the Recycled Water Infrastructure Agreement, an exhibit to the Settlement Agreement, which provides for desalination efforts and funding in the amount of \$2,460,000.

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<sup>41</sup> For example, the Gila River Indian Community Water Rights Settlement Act of 2004 (Pub. L. 108-451) included the Lower Colorado River Basin Development Fund that provided for a payment "to pay annually the fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water held under long-term contracts for use by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act) in accordance with clause 8(d)(i)(1)(f) of the Repayment Stipulation (as defined in section 2 of the Arizona Water Settlement Act)". See Sec. 107 (a)(2)(A).

#### IV. NON-FEDERAL CONTRIBUTION

Pechanga is cognizant that in addition to the Federal contribution, the non-Federal contribution to an Indian water settlement should be proportionate to the benefits received by the non-Federal parties under the settlement. The Band has insisted on such non-Federal contribution from non-Indian parties throughout the negotiations for this settlement and successfully obtained, with the support and assistance of the Federal Negotiation Team, substantial non-Federal contributions to the settlement.

For purposes of the Committee's understanding, we outline each of the non-Federal contributions to the settlement, including Pechanga's own contribution to the settlement.

##### A. RCWD Contribution

As discussed above, the Pechanga Settlement Agreement is a carefully structured settlement with the United States, RCWD and EMWD. Substantial efforts were made by all parties in order to reach settlement. One of the largest issues of contention during negotiations was the allocation of the groundwater in the Wolf Valley Basin. The previous Groundwater Management Agreement allocated 50% of the water to each party. For Pechanga, it was absolutely critical that the Settlement Agreement provide the Band with the majority of the safe yield. Thus, RCWD agreed to allocate an additional 25% of the Wolf Valley Basin to Pechanga as part of the settlement. Additionally, RCWD will wheel the MWD water under the ESAA to Pechanga in perpetuity and RCWD agrees to provide desalination and brine disposal for water utilized in the Wolf Valley, which will improve groundwater quality in the Wolf Valley Basin for both RCWD and Pechanga. RCWD's contribution to the Pechanga Settlement Agreement, therefore, involves more than a foregoing of its assertion of water rights, but, rather, involves the implementation of a partnership to utilize, convey and improve the quality of both local and imported water for both RCWD and Pechanga.

The monetary quantification of RCWD's contribution, measured exclusively upon its agreement to forego the right to 25% of groundwater in the Wolf Valley Basin, has been calculated at \$33,630,332. This calculation assumes that 25% of the Wolf Valley Basin equals 525 acre feet per year, one-fourth of the agreed upon amount of the safe yield in the Wolf Valley Basin. It further assumes that RCWD's contribution will be equal to the rate it must pay for MWD water (as replacement for its share of groundwater from the Wolf Valley Basin), inflated at 3% per year, and an effective earnings rate on the amount expended of 3.5%. Utilizing these assumptions, the present value of RCWD's contribution is \$33,630,332.

##### B. Pechanga Contribution

As with many other Indian water rights settlements, the Pechanga Water Fund Account provides for a subsidy payment that partially fulfills the United States' programmatic responsibility to provide Pechanga with replacement water.

The Pechanga Water Fund Account amount was developed using the following financial assumptions:

- The Account is to be used to partially subsidize the cost of MWD water to reduce the cost of the water using interest earned by the account.
- The Account will pay ten percent (10%) of the cost of the water and Pechanga will pay ninety percent (90%).
- The cost of MWD water was projected based on the published rates for an acre-foot of MWD Tier 2 Treated Water plus the EMWD charge of \$127.80 in 2010, escalated at four percent (4%) per year thereafter.
- The Account is projected to accrue interest at an average four percent (4%) rate of return.
- The amount of MWD water to be purchased each year was based on a general estimate of the projected water use in the proposed MWD service area that cannot be met from other sources.

While most subsidy funds for Tribes provide funds that will bring the cost of the imported water in line with local water, the Pechanga Water Settlement only seeks to subsidize 10% of MWD water such that Pechanga is bearing 90% of the cost of imported water.

#### **C. EMWD Contribution**

While the Band has not completely calculated EMWD's contribution to the Settlement, EMWD's contribution is certainly proportionate to the benefits it will receive from the Settlement. Namely, the ESAA with MWD and EMWD is an absolutely critical component of the Settlement, without which it would be impossible to fulfill the Band's water entitlements. Moreover, EMWD agreed to extend the term of the Recycled Water Agreement with Pechanga and allow Pechanga to sell its unused portion of recycled water to RCWD, both of which were necessary to effectively settle with RCWD. In return for these contributions, EMWD will receive \$332,000 as Pechanga's connection fee to EMWD (discussed in further detail above). This benefit to EMWD is proportionate to the efforts EMWD has made in securing the ESAA with MWD and the amendments to the Recycled Water Agreement.

#### **D. MWD Contribution**

Although MWD is not a party to the actual Settlement Agreement, MWD is a party to the ESAA, which as discussed above, is an exhibit to the Settlement Agreement. The ESAA is essentially the contractual equivalent of an annexation to MWD and EMWD, with the Band's sovereignty issues protected by contract in the ESAA. In 2009, Governor Schwarzenegger issued a State of Emergency for the State of California's drought situation. In response, MWD issued a press release recognizing the severe water supply challenges in California. MWD's press release further stated that MWD has taken a number of critical steps to address the drought, including the reduction of water supplies to member agencies and mandatory water conservation. As a result of California's drought and MWD's efforts to address these problems it is unlikely that MWD will be approving any annexations in the near future.

Accordingly, the ESAA with MWD and EMWD, which has already been approved in principle by the MWD Board is extremely important, without such agreement it would be nearly impossible for Pechanga to "annex" to MWD and receive water supplies to fulfill the Band's water entitlements. Moreover, under the ESAA, Pechanga will become a customer of MWD just like any other customer, such that Pechanga will be able to acquire water from MWD for its future water needs as those needs change. Therefore, as part of the Settlement and in order to fulfill the ESAA, MWD will receive \$1,900,000 as a connection fee from Pechanga to MWD. The value of becoming part of MWD's service area capable of receiving MWD water is invaluable and undoubtedly represents a proportionate contribution to the benefit, if any, MWD will receive.

#### V. Conclusion

As outlined above, the Band is settling its longstanding claims against the United States and other parties, and is accepting less water than it could otherwise obtain in exchange for a commitment for the delivery of "wet" water in replacement for its "paper" water rights. The Federal contribution is commensurate with the Federal government's unfulfilled responsibilities with respect to the Band's water rights and its liabilities relating to the same.

Chairwoman Cantwell and members of this Committee, in closing, I would like to thank the Committee for holding a hearing on this important piece of legislation.

The CHAIRWOMAN. Thank you, Mr. Chairman.

Last on the list is Mr. Matthew Stone. Thank you very much for being here, Mr. Stone. We look forward to your testimony on this legislation. I think you are here to testify on S. 1219.

#### **STATEMENT OF MATTHEW G. STONE, GENERAL MANAGER, RANCHO CALIFORNIA WATER DISTRICT**

Mr. STONE. Yes, thank you very much, Chairwoman Cantwell. It is our pleasure to be here. I appreciate the members of the Committee, the Vice Chair, for their attention to this matter.

On behalf of Rancho California Water District, I appreciate the courtesy of being allowed to appear and just make some brief comments about pending legislation, S. 1219, which would authorize the settlement with the Pechanga Band of Luiseño Mission Indians and their water rights.

As a neighbor and a cooperating party over the last almost a decade now on water management, we are again happy to be here to support this. On behalf of the board, we appreciate Senator Boxer's sponsorship of the bill and Senator Feinstein's co-sponsorship and the committee's willingness to consider the legislation. We will enter formal written comments into the record, but they will about as brief as these at this point.

Rancho provides water supply, wastewater collection and treatment and water recycling services to a population of more than 134,000 people in our service area. It is 160 square miles, and we have over 42,000 customers connected to our system. Our infrastructure network, which has been built out over the last several decades, has 960 miles of water mains, 41 storage reservoirs, Vail Dam and Vail Lake Reservoir, groundwater recharge facilities that have been developed to enhance the operation of the basin, and 47 groundwater production wells.



We currently provide about 71,000 acre feet to our community, which is domestic, commercial, industrial and agricultural uses. We still have a very large agricultural component.

Just over two years ago, I appeared before this committee to endorse efforts to authorize the settlement. Today, I return to again endorse this effort and to advise the committee of our interests in any final bill that can be enacted into law. As has been mentioned by Chairman Macarro, we have worked with the Pechanga Band, and will continue to work with them, since the last Congress to clarify the limited number of outstanding issues. I am happy to report to you today that we have made substantial progress on those, and we believe that these issues are close to resolution.

We are also committed to working with the Administration as the bill goes forward to deal with any issues that are still outstanding from the Administration's perspective. We hope to have these ready as the bill moves to markup for final action.

Madam Chair, thank you again for the opportunity to appear before you today. We look forward to providing the committee with any additional information that will help to expedite final consideration of this legislation. Again, we look forward to completing the agreement and further, to continue our partnership and cooperation with the Pechanga. Thank you.

[The prepared statement of Mr. Stone follows:]

PREPARED STATEMENT OF MATTHEW G. STONE, GENERAL MANAGER, RANCHO CALIFORNIA WATER DISTRICT

Good morning Chairman Cantwell and Vice Chair Barrasso and members of the Committee. On behalf of Rancho California Water District, thank you for the courtesy to appear before the committee to present our views on the pending legislation, S. 1219, a bill to authorize the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act.

On behalf of RCWD's Board of Directors, we deeply appreciate Senator Boxer's sponsorship of this important legislation, and Senator Feinstein's co-sponsorship, and the committee's willingness to consider the legislation.

In the interest of time, I request that my formal written testimony be entered into the record. I will summarize RCWD's views on S. 1219.

RCWD provides water supply, wastewater collection and treatment, and water recycling services to more than 134,000 people in a service area of 160 square miles with over 42,000 service connections. Our infrastructure network consists of 960 miles of water mains, 41 storage reservoirs, Vail Dam and Vail Lake reservoir, groundwater recharge facilities, and 47 groundwater wells. Currently we provide 71,300 acre feet of water for domestic, commercial, industrial, agricultural and landscape uses.

Just over two years ago, I appeared before the committee to endorse efforts to authorize a water rights settlement agreement. Today, I return to endorse this effort and to advise the committee of our interests in any final bill that can be enacted into law.

Since 2010, RCWD has worked with the Pechanga Band to clarify a limited number of outstanding issues. The key issues, we believe, are close to resolution. We hope to have these ready as the bill moves to markup.

Chairman Cantwell, thank you again for the opportunity to appear before you today. We look forward to providing the committee with any additional information that will help to expedite final consideration of this important legislation.

The CHAIRWOMAN. Thank you, Mr. Stone. Thank you for your testimony today and your continued hard work on this legislation.

I am going to go back to you, Assistant Secretary Washburn, on a couple of these bills. On the S. 1447, the original settlements that were in that legislation had the Bureau of Reclamation as the lead

agency in a number of the infrastructure projects. Can you provide the committee with an update on how these settlements are being implemented and the progress on the infrastructure and how that is working out with Rec taking the lead?

Mr. WASHBURN. Well, they are underway. These settlements, these water rights settlements often cost tens of millions of dollars and they take a decade or more to complete. So we have made substantial progress on the Navajo-Gallup settlement. That one is coming along very well. The Aamodt and the Taos settlements are probably, well, they are newer, so we haven't quite gotten as far along. But they seem to be progressing.

We are working well with all the parties and the Bureau of Indian Affairs and the Bureau of Reclamation, of course, work very well together. The Bureau of Reclamation is, well, they are engineers, mostly, and they are very good. We enjoy working with them, and they do a lot of work in this space. They do a lot of work on Indian water rights settlements, and they are very accomplished and capable.

So we feel like things are proceeding nicely on all three of those settlements.

The CHAIRWOMAN. Okay, well, part of that would be moving some of the money around for wildlife and cultural resource protections. Can you tell us about how those funds would be used?

Mr. WASHBURN. Sure. One of the things, I gather that there was a typo in the New Mexico Water Rights Settlement bill, one of those bills that sort of reversed the amount of the money that we use for fish and wildlife resources and cultural resources protection. So one of these bills would correct that, the way we do it more commonly in water rights settlements. So we are happy to, that is an improvement. It changes things back to the way it should have been written in the first place. And those are very important parts of water rights settlements. But we do limit the amount of money in these settlements that can be used for each of those important purposes. So this bill would make an improvement in that respect.

The CHAIRWOMAN. Okay. Then on the Pechanga settlement, it states that allotted lands within the reservation included just and equitable allocation for the water resources. So if it is enacted, how will the Department ensure that the allottees actually get that just and equitable allocation?

Mr. WASHBURN. That is one of the remaining issues and one of the things that we have addressed to some degree already with the Pechanga Band. But one of the concerns that we continue to have, there are 112 trust allotments on the reservation, totaling more than 1,100 acres of land. And individual Indian allottees are also entitled to a portion of the tribal water rights for irrigation purposes. So that is one of the things that we need to get resolved to get this bill to a place where we can be supportive of it. Because it needs to address those very real issues.

The CHAIRWOMAN. That has not been part of another previous water settlement? There is not a structure for the allottees?

Mr. WASHBURN. Well, I think it has varied. We certainly have the same trust responsibility to allottees in many respects that we have to Indian tribes. We have a responsibility to take care of them as well. Honestly, those issues have come to the surface in more

recent years. They were ignored in earlier water settlements, and we have gotten much better about trying to get those issues resolved in water rights settlements. That is an active conversation as to this settlement.

The CHAIRWOMAN. So it is an issue of difficulty, or it is a difficulty of administering it?

Mr. WASHBURN. I am not sure. I am not down in the weeds on the actual negotiations. But it is important to us to make sure that we have taken care of the allottees' interests when we settle the water rights. Otherwise, we have left unfinished business, and we don't want to leave unfinished business.

The CHAIRWOMAN. Mr. Stone or Chairman Macarro, do you have any thoughts on that?

Mr. MACARRO. Yes, I will attempt to answer that. The settlement shouldn't affect their rights at all, the rights of allottees. As you know, the status of allotted land held by former tribal members, to say the least, is complicated. The status of allotment protections to allottees are set forth in provisions relating to the required water code, which is in place. We have a water code and it is in place. We don't think that there will be a net effect on the impact of allottees and their water rights.

We are glad of the due diligence that the Secretary is engaging in, that it is being done and is being done across the board. However, as far as it goes on our reservation, we don't see any net change really in terms of what the outcome is. Insofar as there is a right that exists, the right is a paper right until the wet water right becomes real. We actually think that overall, the tribal right as well as the allottee right, is being perfected. That is a benefit that doesn't exist to allottees right now as well. There is a huge improvement that accrues to allottees as a result of the tribe getting its water right put into place, and getting that wet right perfected.

The CHAIRWOMAN. Assistant Secretary Washburn, back to the settlement issue and funding. Has the Department of Interior ever not funded a settlement that has been passed by Congress?

Mr. WASHBURN. No, I don't believe so. You are the boss, if you settle a water rights claim, whether we support it or not, we follow the law. So money has to be found and that sort of thing. The Congress, though, are the ones who ultimately holds our trust responsibility. You define what our trust responsibility means in any given case. If you find that, we will meet it.

The CHAIRWOMAN. So how were some of those settled in the past?

Mr. WASHBURN. You mean with regard to allottees?

The CHAIRWOMAN. Yes.

Mr. WASHBURN. Well, let me say this. It is an issue that we can address, there are general laws that apply. So it is something that we can address. Part of the issue is just making sure that these, there are much smaller claims to water rights. So you don't want to settle all the biggest claim and then fail to settle the small ones, because the smaller ones then may never get settled.

The CHAIRWOMAN. This is the Indian Lands claim and settlement?

Mr. WASHBURN. Indian water rights settlements. Yes, so you have, the tribe has its own claim and the allottees have claims to the water as well. For interest of finality, we would like to get all of it settled all in one fell swoop when we possibly can, so that we are tying up all the loose ends. Because the small loose ends don't have the political juice to get something done the way that the tribe does and the water districts and that sort of thing.

So we would like to get all of the issues settled in one case.

The CHAIRWOMAN. Which is what we have been striving for here with the Spokane settlement agreement and what you are striving for with others as well. How has the Department funded some of these in the past, like the Missouri River Tribes or some of the other settlements?

Mr. WASHBURN. Well, they have been funded in different ways. Sometimes they come out of the regular Indian Affairs budget over a course of years. I have to say, that is perhaps my least happy outcome, because it means I am taking money from one tribe to apply to help other tribes. That is not the ideal circumstance, because it means that other Indian people are going to pay to take care of a different group of Indian people.

So we have always looked for creative ways to settle these that don't necessarily just come out of the Indian Affairs budget. This is a commitment of the United States, and we have ongoing commitments to each of the tribes. They don't give me the power over the purse, or the Treasury and other agencies. But we always like to see joint contributions across the Federal Government to these kinds of settlements.

The CHAIRWOMAN. You are certainly committed to finding the resources for this settlement.

Mr. WASHBURN. I am as committed as you are.

The CHAIRWOMAN. Thank you.

Okay, well, I think that is all the questions I have. I know my colleagues may have some questions, so we will leave the record open on all three of these bills. I thank all the witnesses for being here, including you, Mrs. Wynecoop. Thank you for traveling all the way from the Pacific Northwest and for your ability to give us a sense of history on this issue as it relates to the Spokane Tribe in the Pacific Northwest.

Again, thank you, Secretary Washburn, for your diligence and your team, everybody that is here on all these issues. We are adjourned.

[Whereupon, at 3:20 p.m., the Committee was adjourned.]

## **A P P E N D I X**

PREPARED STATEMENT OF HON. ERNESTO C. LUHAN, GOVERNOR, TAOS PUEBLO

### **S. 1447**

Honorable Chairwoman Maria Cantwell, Vice Chairman John Barrasso, and Members of the Committee:

My name is Ernesto C. Luhan. I am Governor of Taos Pueblo.

The Taos Pueblo Indian Water Rights Settlement Act was signed into law by President Obama in December 2010 as Title V of Public Law 111-291. The Settlement Agreement between Taos Pueblo, the State of New Mexico, the Taos Valley Acequia Association and 54 member acequias, the Town of Taos, the 12 Taos area Mutual Domestic Water Consumers Associations, and the El Prado Water and Sanitation District approved by the Settlement Act was thereafter conformed to the Act and signed for the United States by the Secretary of the Interior and by Taos Pueblo in December 2012.

With the enactment of the Settlement Act, the conformation of the Settlement Agreement, and the signing of the conformed Settlement Agreement, Taos Pueblo, the United States and the other settlement parties have met three of the seven conditions precedent to the Settlement Agreement and Act becoming final and enforceable. Significant progress has been made on the remaining conditions precedent—Congressional appropriations, State of New Mexico appropriations, State water leasing statute amendment, and the Partial Final Decree setting forth the Pueblo's water rights.

The technical corrections to our Settlement Act in S. 1747 now pending before this Committee are:

1. To clarify that the word "construction" in Section 505(f)(1) of the Settlement Act and Article 9.6.1 of the Settlement Agreement includes reconstruction, replacement, rehabilitation or repair as well as new construction of irrigation infrastructure and other water or wastewater infrastructure.

2. To delete unnecessary authorization dates for the mandatory appropriations in the Settlement Act.

We are asking for this Committee's support of S. 1447 as it will greatly facilitate the implementation of our settlement.

### **1. Clarify the Meaning of "Construction" in the Early Money Provision:**

Taos Pueblo, the place of the Red Willows, is a National Historic Landmark

and was designated a World Heritage Site in recognition of our enduring living culture. Our people have lived in the Taos Valley since time immemorial.

As the first users of the Taos Valley's water resources, we constructed irrigation systems many centuries ago that are still in use today. The traditional earthen ditches that comprise our system are a core element of our cultural practices. They are the means by which we currently irrigate approximately 2,322.45 acres of the Pueblo's 5,712.78 Historically Irrigated Acreage. Importantly, not much more farmland can be irrigated because there is no way to convey water to more fields without extensive construction consisting of repair and rehabilitation of this traditional infrastructure.

The Bureau of Indian Affairs, in its capacity as the federal trustee, has not done any repairs of significance to our irrigation infrastructure in decades. In 2000, a joint investigation report by the Bureau of Indian Affairs and the Bureau of Reclamation identified a serious need for the rehabilitation and repair of Pueblo irrigation infrastructure. The findings of this report were based heavily on investigation of infrastructure on Taos Pueblo.

For these reasons, one of the important purposes for the \$15 million of "early money"—money available upon appropriation—in our settlement is to allow the Pueblo to reconstruct, rehabilitate, repair and replace dilapidated irrigation structures. This purpose is closely related to another purpose of early money: acquisition and retirement of junior non-Indian water rights. The Settlement Agreement specifically provides that "As a goal of this settlement and in accordance with Article 5.1.1.2,<sup>1</sup> the Pueblo will seek to expand the exercise of its HIA [historically irrigated acreage] Right to an amount at least sufficient to irrigate three thousand (3,000) acres as of the Enforcement Date" (Settlement Agreement Article 8.6.1). In order to meet this key settlement goal of increasing our historically irrigated acres actually under irrigation from 2,322.45 acres to 3,000 acres by the Enforcement Date, the Pueblo needs early money not only to acquire and retire non-Indian rights but also for construction on the traditional earthen ditches that are the means of irrigating these 3,000 acres.

Because the Settlement Act uses the word "construction" in describing the water and wastewater infrastructure work for which early money can be used, the Administration has taken the position that the Pueblo cannot use early money for irrigation ditch rehabilitation, repair, replacement, or reconstruction. The only exception the Administration has made is for ditches that bring water to the Buffalo Pasture, on the grounds that the Buffalo Pasture Recharge Project is a purpose for which Section 505(f)(1) authorizes the use of early money.

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<sup>1</sup> Article 5.1.1.2 of the Settlement Agreement provides that the Pueblo will initially limit the exercise of its historically irrigated acreage right for 5,712.78 acres to the recently irrigated acreage level of 2,322.45, and sets out how the Pueblo will increase the use of this right as non-Indian irrigation water use is reduced by the Pueblo buying those rights or circumstances such as abandonment of a water right by a non-Indian user.

The Administration's exceedingly narrow interpretation of the word "construction" poses an unnecessary hardship on the Pueblo and threatens to prevent us from meeting the settlement goal of actually irrigating 3,000 of our historically irrigated acres by the Enforcement Date. Such a limited purpose was never intended by the Pueblo or Congress. Many of our farmlands—including a substantial portion of lands that can be brought back into production as part of the initial 3,000-acre settlement goal—are on ditches that do not serve the Buffalo Pasture. Sections of many of these ditches are in dire need of repair, reconstruction, replacement, or rehabilitation. This was a major reason we insisted that the allowed uses of early money include construction on irrigation infrastructure, not just for planning and design.

All of the irrigation infrastructure construction planned and discussed with the federal Administration and Congressional delegation over the many years of the settlement negotiation and authorization involves our traditional earthen Pueblo ditches. In the context of traditional Pueblo irrigation systems, construction work is obviously not about construction of new ditches—it is about the reconstruction, replacement, repair and rehabilitation of these traditional ditches.

Similarly, most of the work urgently needed on our drinking water infrastructure involves reconstruction, replacement, rehabilitation or repair of existing aging infrastructure, not new construction. For example, we will need an early money distribution to replace the south side water storage tank. A recently completed inspection confirmed that this tank is in dire need of replacement due to extensive corrosion. We fear that it may collapse because the supports are severely corroded. This is an emergency. Additionally, one of the Pueblo's four municipal wells needs to be replaced prior to the Enforcement Date due to poor production. Yet, the Administration's overly narrow interpretation of the word "construction" in Section 505(f)(1) could preclude the release of early money to the Pueblo that Congress intended to be available for such urgently needed reconstruction.

The technical correction in S. 1447 would facilitate giving Congress' intended effect to the word "construction" in Section 505(f)(1). As we have said in correspondence to Bureau of Reclamation Commissioner Michael Connor, it would be a terrible irony for the Administration not to support this technical correction when our settlement has been lauded by Administrations past and present as a model for Indian water rights settlements. One of the reasons our settlement is touted as a model is that it avoids the cost and environmental damage of constructing reservoirs and major new surface water infrastructure, and it does this in part by allowing early reconstruction of existing irrigation facilities in exchange for the Pueblo's forbearance on the full exercise of its senior water rights.

Taos Pueblo respectfully submits that the Administration is mistaken when it characterizes this technical correction as "expanding" the purposes of early money on page 3 of its testimony. It bears emphasis that this is truly a technical correction, not a change in the deal we negotiated. In all of our negotiations with the Administration and throughout the Congressional process, we were never asked to give up the use of early

money for infrastructure rehabilitation, repair, replacement, or reconstruction. We were assured that the word "construction" included reconstruction, replacement, rehabilitation and repair and that it was not necessary for Congress to repeat "reconstruction, replacement, rehabilitation and repair" in Section 505(f)(1) because these concepts were clearly captured in the word "construction" and the cross reference to section 505(a) in Section 505(f)(1). The technical correction would honor this understanding and would be consistent with the common sense interpretation of the meaning of "construction" in the context of traditional Pueblo ditch systems and aging drinking water infrastructure on Pueblo lands.

## 2. Delete Unnecessary Authorization Dates:

The amendment to Sections 509(c)(1)(A) and 509(c)(2)(A)(i), which provide for mandatory appropriations to the settlement funding accounts, are intended to eliminate possible confusion about the meaning of the phrase "for the period of fiscal years 2011 through 2016." As noted in the sponsors' summary, there is no need for any authorization dates for the mandatory appropriations because these funds remain available until expended.

The Administration stated in its testimony (on page 3) that it "is still analyzing this amendment but believes that the changes in indexing will have impacts on the Treasury and could trigger mandatory offset requirements." The Administration's concern arises from its interpretation of the amendment to Section 509(c)(1)(A) as a proposed change to the inflation indexing authorized by the Settlement Act. The Administration reads Section 509(c)(1)(A) of the Act to make the mandatory appropriations subject to indexing "only between fiscal years 2011 and 2016." Consequently, the Administration believes that "S.1447 would remove the time limitations for indexing."

The Pueblo respectfully submits that the Settlement Act provides for inflation adjustments from the base year 2007 and does not state an end year. Specifically, Section 501(c)(1)(A) appropriates "\$50,000,000, as adjusted by such amounts as may be required due to increases since April 1, 2007, in constructions costs, as indicated by the engineering cost indices applicable to the types of construction or rehabilitation involved." Put simply, the amount of the inflation adjustment authorized is the amount of percentage change in the inflation index from April 1, 2007 to March 31, 2017 (the Expiration Date of the Settlement Act authorizations and the date by which the Enforcement Date must occur).

The Pueblo negotiated with the Administration for its support of inflation indexing of the settlement fund from the base year 2007 until the funds become available to the Pueblo in exchange for the reduction sought by the Administration in the amount of early money from \$25 million in the bill as introduced to \$15 million in the bill as enacted. The technical correction would recognize the phrase "for the period of fiscal years 2011 through 2016" in Section 509(c)(1)(A) for what it must be: an unintended relic of the discretionary appropriation authorization that was in the bill until late in the session when the bill was amended to make a portion of the funding mandatory.



The Pueblo strongly disagrees with the Administration's comment that the Settlement Fund "will already be able to earn interest beginning not later than 2017, which will help maintain the purchasing power of the funds provided and make indexing less necessary." The fact that the Secretary of the Interior is obligated to invest Tribal trust funds, including the Pueblo's settlement fund, does not compensate the Pueblo for the loss of any portion of the intended inflation adjustment prior to 2017.

The Administration's unfortunate reading of Section 509(c)(1)(A) to change the base year of inflation adjustment from 2007 to fiscal year 2011 and to cutoff the inflation adjustment prematurely at fiscal year 2016—in the Administration's still ongoing analysis—illustrates the need for the technical correction. The correction will ensure that mandatory appropriations are provided through the Expiration Date in an amount that reflects inflation from the base year 2007 on the initial \$50 million mandatory appropriation.

I thank Chairwoman Maria Cantwell, Vice Chairman John Barrasso, Senator Udall, and members of the Committee for the honor and privilege to provide this testimony. I also give thanks for the spiritual guidance I have received, and the support and advice of our Tribal Council. We ask that you be spiritually guided to make the right decisions on this bill and others that affect the lives and future of the Taos Pueblo people.

## PREPARED STATEMENT OF HON. BEN SHELLY, PRESIDENT, NAVAJO NATION

Dear Madam Chairwoman and Mr. Vice Chairman:

I write to express the support of the Navajo Nation for provisions in S. 1447, a bill to make technical corrections to certain Native American water rights settlements in the State of New Mexico, and for other purposes. The Navajo Nation urges Congress to adopt Section 4 of the bill, which increases the authorization for cultural resources on the Navajo-Gilaud Water Supply Project (NGWSP) from the current 2% of the total project cost to 4% of the total project cost. Section 4 will correct a clerical error in the Omnibus Public Land Management Act of 2009, Title X Part III (Public Law 111-11), that has caused a significant shortfall in available funds to protect and preserve important cultural resources along the NGWSP route.

The NGWSP will bring greatly needed water to the Navajo Nation communities. Yet, this project, which encompasses 280 miles of large diameter pipeline and a 400-foot right of way, will also disturb more than 12,000 acres of land in arguably the most archaeologically sensitive region in North America. Seventy percent of this land is Navajo Nation Trust Land, and we believe strongly that the estimated 1,000 archaeological sites, including ancient burial grounds, along the route must be handled properly and respectfully.

The current budget constraints for cultural resources are already affecting the project design. For instance, the contractor has been forced to modify its research design such that many prehistoric middens and other areas where we would expect to find human remains cannot be sampled. When detected in advance of the construction team, burials can be moved respectfully or the project route can be adjusted. We expect that as a result of the current budget constraints on cultural resources and the limitations for advance work, the construction teams will likely encounter burials and be forced to stop their work, causing untold delays and additional costs to the overall project. S. 1447, when passed, will help ensure the ancient burials located along the pipeline will be handled respectfully as required by the Navajo Nation Policy for the Protection of Interschad Gravesites, Human Remains, and Pottery Items and the Native American Graves Protection and Repatriation Act and that archaeological sites are identified and protected as required by the National Historic Preservation Act.

Completing the NGWSP in an expedited manner is of great importance to the Navajo Nation and to the United States Department of the Interior, which has designated this project as its top priority. Ensuring that 4% of the project cost is available for cultural resources survey and mitigation will help keep the project on schedule and ensure that our heritage is treated with the care and respect it deserves.

PREPARED STATEMENT OF THOMAS MOTSINGER, PRESIDENT/FOUNDER, PALEOWEST  
ARCHAEOLOGY

Chairwoman Cantwell, Vice-Chairman Barrasso and Members of the Committee, my name is Thomas Motsinger. I am President and Founder of PaleoWest Archaeology, based in Phoenix, Arizona. Thank you for the opportunity to present PaleoWest's views on S. 1447, the New Mexico Native American Water Settlements Technical Corrections Act, a bill to make technical corrections to certain Native American water rights settlements in the State of New Mexico, and for other purposes.

Background

PaleoWest is contractor to Bureau of Reclamation for the first phase of cultural resources field work at the Navajo-Gallup Water Supply Project, which will affect nearly 1,000 archaeological sites and disturb 12,000 acres in New Mexico of arguably the most archaeologically sensitive region in the United States. Approximately 280 miles of large diameter pipeline (60-70") will be laid, with a 400-foot right-of-way and at least 100 additional miles of roads, power lines, and other necessary apparatus. The Omnibus Public Land Management Act of 2009, Title X Part III (Public Law 111-11) signed on March 30, 2009 (the "Act"), provided the authorization to construct this important project as a major component of the Navajo Nation San Juan River Basin Water Rights Settlement in New Mexico.

Drafting Error

When the Act was passed, it contained a drafting error resulting in 2% of project costs allocated to cultural resources compliance and 4% to environmental compliance, instead of 4% to cultural and 2% to environmental, as intended by Congress and the parties. This drafting error is causing funding constraints that are affecting PaleoWest's research design. We cannot adequately survey for human remains in advance of pipeline construction;

when construction crews encounter unexpected remains, it will result in costly delays. We have been forced to modify our research design such that we cannot sample many prehistoric middens and other areas where we would expect to find human remains. The bill, when passed, will help ensure the respectful handling of ancient burials located along the pipeline, as required by the Native American Graves Protection and Repatriation Act, and the identification and protection of archaeological sites, as mandated by the National Historic Preservation Act.

To date, the project's archaeologists and ethnographers have been finding prehistoric and historic-era archaeological and ethnographic sites in much greater numbers than anticipated. Most of these sites will require additional investigation to comply with Federal and Tribal historic preservation laws. The majority of the sites are prehistoric occupations dating after 700 A.D, which typically contain human burials; these sites are particularly sensitive to Native Americans and are afforded special protection. As expected, Navajo archaeological sites and traditional cultural properties – which date from the 1500s to recent times – are plentiful, but have been encountered across a much larger area than expected.

We understand that the Administration is fully in favor of the technical amendments to the Navajo-Gallup settlement in S. 1447 because it changes the Act back to the way it should have been written and thus improves it. Also, keeping the project on schedule is a top priority of the Department of the Interior.<sup>1</sup> Finally, the Navajo Nation supports the technical correction because 70% of the Project's land is Navajo Nation Trust Land, and the Navajo are concerned that archaeological sites and ancient burials be handled respectfully. If the 4% technical correction is made, PaleoWest will be able to do a thorough and respectful job at the Navajo-Gallup project, and ensure the proper handling of remains.

#### Conclusion

PaleoWest would like to thank you Chairwoman Cantwell, and all the members of the Senate Committee on Indian Affairs for the opportunity to submit testimony. I would be happy to answer any questions the Committee may have.

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<sup>1</sup> "Obama Administration Announces Selection of 14 Infrastructure Projects to be Expedited through Permitting and Environmental Review Process," Oct. 11, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/10/11/obama-administration-announces-selection-14-infrastructure-projects-bc-c>.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
HON. KEVIN WASHBURN

1) Under the Administration's reading of the Settlement Act without the Technical Correction, has Congress in effect authorized Taos Pueblo to spend early money on new construction regardless of urgency, instead of on reconstruction of aging systems that are in urgent need?

**Answer:** The Department continues to review the range of eligible purposes the Taos Pueblo may utilize funding for from the Taos Pueblo Development Fund pursuant to Section 505(f). As I testified before this Committee, the Administration is committed to working with the Taos Pueblo and the bill's sponsors to determine what problems the Taos Pueblo needs to address. These discussions pertain in part to the eligible activities associated the \$15 million in "early money"; and these discussions remain ongoing.

2) In your testimony you [expressed] a desire to work further with the Taos Pueblo on the provisions in this bill defining the uses of the "early money" made available to the Pueblo for protection of the Buffalo Pasture and related projects.

It is my understanding that Article 8.6.1 of the Settlement Agreement provides that a goal of the settlement is for Taos Pueblo to "expand the exercise of its Historically Irrigated Anchorage Right to an amount at least sufficient to irrigate three thousand acres as of the Enforcement Date." In other words part of the purpose of this pre-Enforcement Date funding, or "Early Money" is to expand the Pueblo's irrigated acreage right to 3,000 acres.

It is also my understanding that some repairs to Taos Pueblo's traditional irrigation ditches are needed for the Pueblo to expand to 3,000 acres, and that some of those ditches in urgent need of repair on the south side of the Pueblo, where they cannot qualify for the other early money purpose of delivering water to the Pueblo's Buffalo Pasture wetland.

- Given this situation, isn't the use of early money for irrigation infrastructure repairs consistent with the Settlement Agreement?
- Would the Administration oppose a Technical Correction that allowed the Pueblo to do some of the most urgent irrigation ditch and potable water system repairs with a portion of the early money?

**Answer:** As I noted in the previous question, the Department continues to review the range of eligible purposes the Taos Pueblo may utilize funding for from the Taos Pueblo Development Fund pursuant to Section 505(f).

3) S 1447 corrects a typo in the original Navajo Water Settlement legislation which switched the allocations for survey and protection of archaeological resources with allocations for mitigation of fish and wildlife habitat destruction. S, 1447 returns these allocations to the standard 4% of

project funding can be used for protection of cultural resources and 2% for fish and wildlife facilities.

- Could you tell the committee the current status of archaeological work on the Navajo Gallup pipeline?

**Answer:** Archaeological work on the Navajo-Gallup Water Supply Project is nearing completion of initial National Historic Preservation Act Section 106 compliance inventory efforts in support of planning and design of pipeline reaches. As the final construction alignments are refined for individual reaches, cultural resource mitigation measures will be completed to allow construction to continue. Archaeological monitoring of construction activities is ongoing as Project work proceeds.

- Is the Bureau of Reclamation running up against their limited allocation of 2% of project funding?

**Answer:** While cultural resource expenditures to date are not approaching the currently authorized 2% allocation, some of the most expensive components of the cultural resources compliance program have yet to occur, namely the mitigation efforts that will be required. Decisions on the appropriate disposition of the potentially impacted sites will be driven, in part, by the amount of funding available for cultural resource work. Clarity on the amount of funding available for the cultural resource work will assist in this process and allow for better decisions that will respect Native American cultures and tribal values.

4) Section 4 of S 1447, the New Mexico Settlements Technical Corrections Act, would amend the Navajo Water Settlement to put the word "Project" before "water" in reference to the trigger of the 10 year clock for waiving of OM and R costs allocable to the Navajo Nation for any completed section of the project that are in excess of the ability of the Nation to pay. The intent of this change is to make clear that the 10 year period of OM and R assistance should not start until water associated with the project, or "Project Water" as referred to throughout the statute, is through the flowing completed portion of the project. It is my understanding that there is some possibility that non-project water, likely groundwater, could be used in portions of the pipeline project before full completion and before project water is delivered.

- In your opinion, is the simple clarification of "Project water" proposed in S 1447, sufficient to make clear the intent of the parties that the 10 years of OM and R assistance will only be triggered when project water, and not any other water, is delivered in a completed section?

**Answer:** Section 10603(b) of PL 111-11 defines Project water as water that is diverted from the Navajo Reservoir and the San Juan River. We believe that the simple clarification of "Project water" as proposed in S 1447 is sufficient to define the intent that the 10 year waiver of OM&R assistance will begin when water diverted from the San Juan River, or Navajo Dam, is delivered to a completed section, and that the 10-year period would not be triggered when groundwater or any other non-Project water is delivered.

- Is there a need to insert a more clear definition of "Project Water"?

**Answer:** We believe that Section 10603(b) provides an adequate definition of "Project water".